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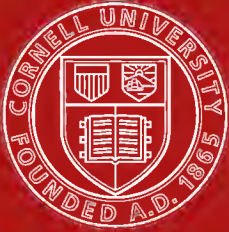
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NORTH ATLANTIC COAST FISHERIES

PROCEEDINGS

IN THE

North Atlantic Coast Fisheries
Arbitration

BEFORE

THE PERMANENT COURT OF ARBITRATION
AT THE HAGUE

UNDER THE PROVISIONS OF THE GENERAL TREATY OF
ARBITRATION OF APRIL 4, 1908, AND THE SPECIAL
AGREEMENT OF JANUARY 27, 1909, BETWEEN
THE UNITED STATES OF AMERICA
AND GREAT BRITAIN

(IN TWELVE VOLUMES)

VOLUME VIII

NORTH ATLANTIC COAST FISHERIES

THE
ARGUMENT OF THE
UNITED STATES

BEFORE

THE PERMANENT COURT OF ARBITRATION
AT THE HAGUE

UNDER THE

PROVISIONS OF THE SPECIAL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA AND GREAT BRITAIN
CONCLUDED JANUARY 27, 1909

NOTE.—This volume contains also the Printed Argument of Great Britain.

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THE ARGUMENT OF THE UNITED STATES.

INTRODUCTORY STATEMENT.

The exploitation of the fisheries about the Island of Newfoundland and in the neighboring seas was among the first results of the discoveries made in the North Atlantic Ocean by European voyagers at the beginning of the sixteenth century. While the fishermen of other nations during the early years frequented these waters, the assertion of sovereignty over the adjoining continent and islands and their partial occupation by Great Britain and France resulted in the practical monopoly of the fisheries by these two states. In the rivalry for the mastery of North America, which resulted from this occupation of the coasts, the control of the fisheries played an important part; and in the wars between Great Britain and France, waged in Europe over the successions to the Austrian and Spanish thrones, the conflict in America took the form of a struggle to possess the fisheries even more than one for territorial acquisition. For a century a state of war prevailed between the two great colonizing powers, with occasional periods of peace, Great Britain growing constantly stronger and encroaching more and more upon the colonial possessions of France, until the fall of Quebec brought to an end the contest and the triumph of the British arms was complete.

Thus the coasts and islands, adjacent to the great fishery, were, at the outbreak of the American War for Independence in 1775, possessions of Great Britain. Since the Treaty of Utrecht, in 1713, the Island of Newfoundland had been British territory, although France had reserved for the benefit of French subjects the right to fish along certain portions of the eastern and northern coasts and to use the strand for the purpose of drying and curing their fish. By the treaty of 1763, following the overthrow of the French power in America, the sovereignty of the neighboring continental coasts and islands had passed from France to Great Britain.

In accordance with its policy of monopolizing the colonial trade for the interests of residents of Great Britain, the British Government

discouraged permanent settlements in Newfoundland with the object of preserving the island as a place of resort for British fishermen where they could find shelter in its numerous bays and use the strand for drying and curing their fish before returning to their home ports across the ocean. As a result of this policy, which was continued to a time subsequent to the year 1818, Newfoundland was in 1775 substantially uninhabited. As to the other islands and the shores of the continent, ceded by France to Great Britain in 1763, twelve years of possession had been too brief a period for extensive development, and only a few settlements had been made throughout the thousands of miles of coast stretching from the Bay of Fundy to the Straits of Belleisle.

Previous to the American War for Independence the colonists of New England had engaged extensively in the North Atlantic fisheries as British subjects, and had freely resorted to the harbors of the unsettled coasts of the continent and islands, using them as bases for their fishing operations in the inshore waters and upon the outlying banks. To these hardy settlers had been due, in large measure, the success of Great Britain in the long struggle with France for the sovereignty of America, and it was a just recompense for their patriotic efforts that they should share in all the benefits which accrued to Great Britain from the conquest of New France.

The fishing grounds upon the coasts of Newfoundland were then the resort of two fleets of fishing vessels coming from a distance; one from the British Isles, the other from the ports of the New England colonies lying almost as far distant to the southwest as Great Britain lay to the east. Both fleets were under the British flag, and neither of them was subject to any competition or interference from local fishermen or dwellers upon the shores of Newfoundland. Both in 1783 and in 1818 the problem for the negotiators to solve was to reconcile and adjust the rights of these two bodies of fishermen long accustomed to sailing from distant ports to their common fishing grounds, there to pursue their calling.

The use of the harbors of the coasts, adjacent to the fisheries, for purposes of shelter, and of the protected shores for drying and curing fish, then the only method of preparing them for market, was necessary to the successful prosecution of the industry. When, therefore, the thirteen American colonies had won their independ-

ence from the British crown, the Continental Congress sent their Commissioners to Paris to negotiate a treaty of peace with instructions to insist upon a retention of the rights in the fisheries of the North Atlantic, which their fishermen had previously enjoyed as British subjects, and to which they deemed themselves entitled by long-continued usage and by reason of the services which they had rendered in the wars with France, which gave to Great Britain the mastery of the fisheries through the possession of the adjoining coasts.

John Adams, one of the American Commissioners, who specially represented the interests of New England at Paris, and was the champion of the American fishing industry, in after years stated, that the American Commissioners took the position that the treaty, which was to be negotiated between Great Britain and the new-born confederacy of the United States, was a division of the British empire in North America; that the fisheries, with the essential right of resort to the neighboring harbors and shores, was, like the territory, the subject of partition; and that the treaty was to be "nothing more than a mutual acknowledgement of antecedent rights."

With this conception of their mission and of the American rights, which they were to conserve, the Commissioners of the United States entered upon the negotiation at Paris.

On October 8, 1782, the negotiators agreed upon a draft of treaty, which included the following article in reference to the fisheries:

3rd. That the subjects of his Britannic Majesty and people of the said United States shall continue to enjoy unmolested the right to take fish of every kind on the banks of Newfoundland, and other places where the inhabitants of both countries used formerly, to wit, before the last war between France and Britain, to fish and also to dry and cure the same at the accustomed places, whether belonging to his said Majesty or to the United States; and his Britannic Majesty and the said United States will extend equal privileges and hospitality to each other's fishermen as to their own.

This draft was sent to England for the consideration of the British Government, and, upon their signifying their disapproval, a second set of articles was prepared November 5, 1782, which contained the following:

That the subjects of his Britannic Majesty and the people of the said United States shall continue to enjoy unmolested the right to take fish of every kind on all the banks of Newfoundland, also in the Gulf of St. Lawrence, and all other places where the inhabitants of

both countries used at any time heretofore to fish; and also to dry and cure their fish on the shores of the Isle of Sables, Cape Sables, and the shores of any of the unsettled bays, harbors, or creeks of Nova Scotia, and of the Magdalen Islands. And his Britannic Majesty and the said United States will extend equal privileges and hospitality to each other's fishermen as to their own.

These provisional articles, like the former, were referred to London for approval, and they were likewise rejected by the British ministry, who prepared and forwarded to Paris a counter draft, which was on November 25, 1782, delivered to the American Commissioners. The fisheries article proposed by the British Government was as follows:

Article III. The citizens of the said United States shall have the liberty of taking fish of every kind on all the banks of Newfoundland, and also in the Gulf of St. Lawrence; and also to dry and cure their fish on the shores of the Isle of Sables and on the shores of any of the unsettled bays, harbors, and creeks of the Magdalen Islands, in the Gulf of St. Lawrence, so long as such bays, harbors, and creeks shall continue and remain unsettled; on condition that the citizens of the said United States do not exercise the fishery, but at the distance of three leagues from all the coast belonging to Great Britain, as well those of the continent as those of the islands situated in the Gulf of St. Lawrence. And as to what relates to the fishery on the coast of the Island of Cape Breton out of the said gulf, the citizens of the said United States shall not be permitted to exercise the said fishery, but at the distance of fifteen leagues from the coasts of the Island of Cape Breton.

The most noticeable differences between this proposed article and the ones, which had preceded it in the negotiations, were the elimination of the reciprocal use of the shores of the United States by British fishermen, and the prohibition imposed upon American fishermen of taking fish within three leagues of the British coasts generally and within fifteen leagues of the Island of Cape Breton in particular, following, as to this prohibition, the terms of the treaty of 1763 with France. In addition to these differences the proposed article limited the shores open to Americans for the purposes of drying and curing fish to those of the Isle of Sables and the Magdalen Islands.

This British counter draft had been forwarded to Mr. Oswald, the British Commissioner, with an authorization by his Government to use his discretion in reaching a final agreement with the American Commissioners in relation to the fisheries; and upon the latter emphatically declining to consider the proposed restriction of the

American right of fishery, and the proposed limitation of the shores, which the Americans might use for drying and curing, Mr. Oswald exercised his discretionary powers and assented to an article along the general lines, which had been insisted upon by the American Commissioners.

The agreement thus reached, which became Article III of the provisional treaty, and was without change incorporated in the definitive treaty of September 3, 1783, is as follows:

It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island) and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlements, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.

Under these treaty provisions the American fishermen continued to enjoy unmolested the rights of fishery in all the bays, creeks, and harbors of the coasts of the British colonies and of resort to their shores for the space of thirty years, when the War of 1812 between the United States and Great Britain interrupted the industry, and raised an issue between the two Governments as to the permanency of the American rights. This issue related to the second clause of the fishery article of the treaty, by which Great Britain recognized the right of American fishermen to fish in the inshore waters of the British possessions and to use the strand for curing and drying their fish. These provisions the United States declared to be permanent and not abrogated by the war, on the ground that in the partition of the British empire in America by the treaty of 1783 the act of partition applied in the same way to the fisheries that it did to the territory, and that, since the division of territory survived the war, so the division of the fisheries survived. Great Britain, on the other hand, insisted that the American rights in the inshore fisheries and to the

use of the strand were annulled by a subsequent war and were not revived by the resumption of peaceful relations.

As neither Government would recede from its position the treaty of peace of 1814 was concluded without a provision harmonizing or compromising these differences.

In the years immediately following the peace of 1814 the American fishermen resorted to the inshore waters of the British colonies as they had prior to the war, but warnings and seizures by armed vessels of Great Britain interfered with the industry, and the voluminous diplomatic correspondence, which resulted, emphasized the irreconcilable differences which existed between the two Governments as to American fishing rights subsequent to the War of 1812.

It was these differences, which caused the subject of the fisheries to be included in the negotiations of 1818, and it was to them that reference is made in the preamble in Article I of the treaty of 1818, which article reads as follows:

Whereas differences have arisen respecting the Liberty claimed by the United States for the Inhabitants thereof, to take, dry and cure Fish on Certain Coasts, Bays, Harbours and Creeks of his Britannic Majesty's Dominions in America, it is agreed between the High Contracting Parties, that the Inhabitants of the said United States shall have forever, in common with the Subjects of His Britannic Majesty, the Liberty to take Fish of every kind on that part of the Southern Coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the Western and Northern Coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the Coasts, Bays, Harbours, and Creeks from Mount Joly on the Southern Coast of Labrador, to and through the Straits of Belleisle and thence Northwardly indefinitely along the Coast, without prejudice however, to any of the exclusive Rights of the Hudson Bay Company; and that the American Fishermen shall also have the liberty forever, to dry and cure Fish in any of the unsettled Bays, Harbours, and Creeks of the Southern part of the Coast of Newfoundland hereabove described, and of the Coast of Labrador; but so soon as the same, or any Portion thereof, shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Portion so settled, without previous agreement for such purpose with the Inhabitants, Proprietors, or Possessors of the ground. And the United States hereby renounce forever, any Liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure Fish on, or within three marine Miles of any of the Coasts, Bays, Creeks, or Harbours of His Britannic Majesty's Dominions in America not included within the above mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours for the purpose of Shelter and of repairing Damages therein, of purchasing Wood, and of obtaining Water, and for no other purpose whatever.

But they shall be under such Restrictions as may be necessary to prevent their taking, drying or curing Fish therein, or in any other manner whatever abusing the Privileges hereby reserved to them.

With this preliminary statement, showing the origin and nature of the differences, which Article I of the treaty of 1818 was intended to compose, it is proposed to proceed with a separate consideration of each of the seven Questions submitted by the Special Agreement of January 27, 1909, involving the true interpretation of the provisions of that article.

Before entering upon a discussion of the Questions counsel of the United States deem it proper to make a reservation. This argument will for convenience refer to the fishing liberty of the United States as a grant made by the treaty of 1818. It is not intended by following this method of reference to depart from the traditional and, as it is believed, the well-founded contention of the United States that its rights under Article III of the treaty of 1783 were not abrogated by the War of 1812 but survived that conflict.

If the vicissitudes of time should ever bring into question the continued existence of Article I of the treaty of 1818, the United States will not be estopped by the nature of this submission or by the use of any terms or phrases in this argument from insisting that the rights of fishery confirmed to it by Article I of the treaty of 1818 and the rights renounced by that article stand upon precisely the same footing as they did before the treaty of 1818 was entered into.

For the purposes of this submission, however, Article I of the treaty of 1818 is recognized as the measure of the rights and obligations of the United States and of Great Britain so far as the Questions to be decided by this Tribunal are concerned.

QUESTION ONE.

To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance—

(a) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and the liberty which by the said article 1 the inhabitants of the United States have therein in common with British subjects;

(b) Desirable on grounds of public order and morals;

(c) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly, an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character—

(a) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(c) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

SCOPE AND MEANING OF THE QUESTION.

It does not require critical analysis of the foregoing Question to demonstrate that the two Governments are in substantial accord with respect to subdivisions (a) and (b) of the contentions of the United States, namely, that the exercise of the liberty to take fish on the part of the inhabitants of the United States, referred to in Article 1 of the treaty of 1818, is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in respect of (1) the hours, days, or seasons when such inhabitants may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations, or (3) any other limitations or restraints of similar character "(a) unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and (b) unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States and not so framed as to give an advantage to the former over the latter class."

The particular requirements or characteristics of the regulations to be made are stated by the two Governments in almost identical terms, except in one particular. The statement of the contention of the United States in subdivision (b) is that the regulations must not be so framed as to give the British fishermen "an advantage" over the fishermen of the United States. The equivalent statement in the British contention is that they must not be so framed "as to give unfairly an advantage to the former over the latter class." It will be seen from this statement of the British contention that that Government contemplates the making of regulations of the fisheries which give the British fishermen an advantage over fishermen of the United States; and since that Government and its colonies, under its contention, are to make the regulations and determine for themselves whether the advantages they permit to their own fishermen are fair or unfair, no very certain or determinate right will be left to the United States and its fishermen if the British contention should prevail. The fishermen of the United States will be left to struggle with fishermen of Newfoundland under regulations of the latter, made and designed by them for their own advantage, and with no limitation on the power of making them, except the Newfoundland conception of what is fair or unfair.

The main contention in the case is stated in subdivision (c) of the statement of contentions on the part of the United States, namely, that limitations or restraints on the exercise of the American right of fishing can not be imposed by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations "(c) unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord, and the United States concurs in their enforcement."

The British Case^a distorts the question raised by that contention into the following: "Stated in general terms, the question is, whether certain nationals, with treaty liberty to enter alien territory and do certain acts there, are exempt from all the local laws, applicable to persons engaged in those acts, in force in that alien territory, unless their appropriateness, necessity, reasonableness, and fairness have been passed upon, and their enforcement concurred in by the government of their own country."

Passing by the loose terminology employed to describe a common and perpetual right of fishery in its territorial waters granted by one government to another, it is observed with respect to this statement of the British Case that the United States does not now claim, and has never claimed, that its nationals, when visiting the territorial waters of Great Britain for the purpose of there engaging in the common fishery secured to them, "are exempt from all local laws applicable to persons engaged in those acts in force in that alien territory, unless their appropriateness, necessity, reasonableness, and fairness have been passed upon and their enforcement concurred in by the government of their own country." It is not questioned that inhabitants of the United States, resorting to the treaty coast to fish, are bound by all local laws which do not limit or restrain or burden them in the very matter of the time and manner of taking fish, and hence that the great body of the civil and criminal laws of Great Britain, Canada, and Newfoundland apply to the American fishermen to the same extent as to other persons coming within or residing within British jurisdiction. These propositions are not raised by the Questions submitted for decision and have never been and are not now contested by the United States.

Passing for the moment the question of the proper interpretation to be placed on certain words and phrases of the treaty, and assum-

^a British Case, 20.

ing that such interpretation will show that there are no words or phrases in the treaty which expressly or by necessary implication reserve to Great Britain power to limit or restrain in any manner the enjoyment by American fishermen of the right to take fish, the United States submits that the question at issue between the two Governments is as to *what regulation of the freedom of the fishery in the matter of the time and manner of taking fish remains part of British sovereignty over waters within which exclusive sovereignty over the fishery has been parted with by Great Britain by virtue of its grant to the United States of an equal right in the said fishery.*

The phrase, "the matter of the time and manner of taking fish" is here used as comprehending and embracing the several matters of regulation specified in Question One. Regulations in respect to the hours, days, or seasons when fish may be taken go to the time, and regulations in respect to the method, means and implements to be used in fishing go to the manner. The third specification of regulations, viz, "any other matters of a similar character relating to fishing" does not, it is conceived, enlarge the character of the regulations submitted for the judgment of this Tribunal, because, on the principle *noscitur a sociis*, the other matters must have relation to and be *ejusdem generis* with those first enumerated.

INTERNATIONAL SERVITUDES.

The United States submits that the treaty of 1818 created an international servitude in its favor to be exercised within British territory—a real right as distinguished from an obligation. What the servitude is, its measure and extent, and whether Great Britain reserved any right to impair its enjoyment by limiting regulations depend, of course, on the terms of the treaty. The United States will undertake to show that the treaty contained no such reserved right, and will insist that, in the absence of such reserved right, Great Britain has no power, without the consent of the United States, under the principles of international law, to limit, restrain, or burden in any manner the exercise and enjoyment of the servitude.

It is proposed to discuss, first, the doctrine of international servitudes, because, it is thought that, to establish clearly the nature in

international law of the right conferred upon the United States by the treaty of 1818, will aid in solving the conflicting contentions under this Question. The provisions of the treaty will then be examined to determine the measure and extent of the right conferred and whether the granting state has reserved the right to make limiting regulations; application will then be made to the several contentions of Question One of the principles of international law which it is thought properly govern them.

NATURE OF AN INTERNATIONAL SERVITUDE.

The conception of international servitudes, so clearly recognized in international law and applied by nations in their intercourse, is borrowed from the Roman law. The various examples of the *jura in re aliena*, recognized by that law, are enumerated and their nature defined, by the writers on the civil law, among whom those mentioned below may be cited.^a

The Roman law servitudes were divided into personal servitudes, the *usus*, *usufructus*, *habitatio* and *operæ servorum*, and real (*praedial*) servitudes. The latter were again divided into rural servitudes, (*servitutes praediorum rusticorum*) and urban servitudes (*servitutes praediorum urbanorum*). The most important of the rural servitudes were the *servitus itineris*, *actus*, *viae*, and *aqueductus*, embracing the several rights of way, and the right of drawing water on another's land.

The most important urban servitudes were the *servitus altius non tollendi*, having reference to the height of buildings; the *servitus tigni immitendi*, the right of placing beams in a neighbor's wall to support the story of a building; the *servitus oneris ferendi*, the right to use a neighbor's wall to support another wall; and the *servitus stillicidii*, the right to drop or to conduct rain water on a neighbor's premises. The praedial servitudes were inseparably connected with land and must have had as a necessary foundation a *praedium serviens* upon which the servitude was imposed and a *praedium dominans* to enjoy the benefit of the servitude. The one piece of land was said to *serve* the other.

^a Moyle: *The Institutes of Justinian*, 4 ed. (1906), pp. 46-47. Moyle: *Imperatoris Justiniani Institutiones*, 2 ed., pp. 216 note, 217 note, 219-222 notes. Sohm: *Institutes of Roman Law*, translated by Ledlie, 2 ed. (1901), pp. 358-368.

The servitudes were either positive or negative, and were said to consist *in patiendo*, the allowance by the owner to another of some beneficial use of his land, or, *in non faciendo*, the owner being obliged to refrain from doing some act in connection with his land which he would otherwise be at liberty to do. No servitude could consist *in faciendo*; that is, that the owner be obliged to perform some affirmative act or duty. Rights of the latter class were called obligations and were *in personam*. Rights of the former class were true *jura in re aliena* and were rights *in rem*. Servitudes, once created and until extinguished, were inseparably connected with the land, passing with the land (both the *praedium serviens* and the *praedium dominans*) when conveyed to third persons and to their successors.

Doctor Moyle^a defined a servitude, embracing both real and personal servitudes in his definition, as "a real right, vested in or annexed to a definite person or piece of land, over some object belonging to another, and limiting the enjoyment of that object by that other in a definite manner."

Doctor Sohm traces the development of servitudes to the exigencies of human intercourse, which can not be satisfied by ownership alone, but require that it be possible for one person to lawfully deal with things which belong to another; and to the fact that mere obligatory rights of that character would be incomplete because subject to be defeated, and not capable, while subsisting, of adequate protection. He says:^b

Thus the rights we acquire in respect of the property of others by means of obligatory transactions are but incomplete, because their effect is merely personal. The need we are here discussing is therefore not adequately met by transactions of this description. There must be rights in respect of the property of others which enjoy a more effectual protection. It was for the purpose of satisfying the need in question that the *real rights in re aliena* were developed. The rights they confer in respect of the things are stronger, because they are absolute, i. e. they are rights which operate and are enforceable as against any third party.

The servitude of the Roman Law is thus a real right, that is to say, a *jus in re aliena*, as distinguished from a mere obligation. It existed between estate and estate for the benefit of the dominate estate; it was created for the benefit of that estate, and the right of enjoyment passed with the land into whose hands soever it came, until the

^a Moyle: *Imperatoris Justiniani Institutiones*, 2 ed., p. 216, note.

^b Sohm: *Institutes of Roman Law*, 2 ed., pp. 357-358, sec. 68.

servitude was extinguished by operation of law or by the act of the parties.

The analogy between the servitude of the Roman Law and that of international law is so obvious as not to require discussion. From the private law of Rome the doctrine of servitudes passed into Germany, and was the immediate source of the so-called state servitudes, so frequently met with in the relations of the German states under the old Empire; and by means of the careful and learned treatises of German writers as well as by the reasonableness of the institution, the doctrine has been firmly incorporated into the theory and practice of modern international law.^a

^a See the following references to International Law, in all of which the doctrine of servitudes is recognized and treated with varying degrees of fullness and detail: Bluntschli: *Das Moderne Völkerrecht der civilisirten Staaten* (1868, French translation by Lardy, 5th ed., 1895), secs. 353-359, pp. 212-215; Bouffis: *Manuel de Droit International Public*, 5th ed. edited by Fauchille, (1908), secs. 339-344, pp. 189-192; Calvo: *Dictionnaire de Droit International* (1885), Vol. II, pp. 214-215; idem: *Droit International*, 5th ed. (1890), Vol. III, sec. 1583, pp. 356-357; Chrétien: *Principes de Droit International Public* (1893), secs. 259-263, pp. 263-273; Clauss: *Die Lehre von den Staatsdienstbarkeiten* (1894); Creasy: *First Platform of International Law* (1876), secs. 256-261; Despagne: *Cours de Droit International Public*, 3d ed. (1905), secs. 190-192, pp. 204-207; Diena: *Principi di Diritto Internazionale* (1908), pp. 125-129; Fiore: *Diritto Internazionale Codificato*, 4th ed. (1909), secs. 1095-1097, pp. 428-429; idem: French translation by Chrétien (1890), secs. 615-619; idem: *Nouveau Droit International Public* (French translation by Antoine, 1885), Vol. I, sec. 380-381, pp. 336-338; Vol. II, secs. 829-830, pp. 116-118; Fabre: *Des Servitudes dans le Droit International* (1901); Gareis: *Institutionen des Völkerrechts* 2d ed. (1901), sec. 71, pp. 205-206; Hall: *International Law* 5th ed. (1904), pp. 159-160; Halleck: *International Law* (1861), ch. IV, sec. 20, pp. 92-93; Hartmann: *Institutionen des praktischen Völkerrecht* (1874), sec. 62, pp. 179-181; Heffter: *Europäisches Völkerrecht der Gegenwart* (1844), French edition edited by Geffcken (1883), secs. 43, 64, 67, pp. 104-108, 154, 158; Heilborn: *System des Völkerrechts* (1896), pp. 30-34; Holtz: *Begriff und Wesen der Staatsservituten* (1908); Holtzendorff: *Handbuch des Völkerrechts* (1887), Vol. II, sec. 52, pp. 246-252; Klüber: *Droit des Gens Moderne de l'Europe* (1819, cited from Ott's 2d ed., 1874), secs. 137-139, pp. 194-198; Lomonaco: *Trattato di Diritto Internazionale Pubblico* (1905), p. 248; G. F. de Martens: *Précis du Droit des Gens Moderne de l'Europe*, edited by Vergé (1864), Vol. I, sec. 115, pp. 313-315; F. de Martens: *Traité de Droit International* (French translation by Léo, 1883), Vol. I, secs. 93-95, pp. 479-491; Mérignhac: *Traité de Droit International Public* (1907), Vol. II, pp. 366-370; Neumann: *Grundriss des heutigen Europäischen Völkerrechts*, 3d ed. (1885), sec. 13, pp. 31-33; Olivart: *Tratado de Derecho Internacional Publico*, 4th ed. (1903), sec. 53, pp. 368-372; H. B. Oppenheim: *System des Völkerrechts*, 2d ed. (1866), secs. 9-10, pp. 140-145; L. Oppenheim: *International Law* (1905), Vol. I, secs. 203-208, pp. 257-263; Phillimore: *International Law*, 3d ed. (1879), Vol. I, secs. 277-283, pp. 388-392; Piédelièvre: *Précis de Droit International Public* (1894), sec. 288, p. 259; Pradier-Fodéré: *Traité de Droit International Public* (1885), Vol. II, secs. 834-845, pp. 395-406; Rivier: *Lehrbuch des Völkerrechts*, 2d ed., 1899, pp. 192-194; idem: *Principes du Droit des Gens*, 1896, Vol. I, sec. 23, pp. 296-303; Taylor: *International Public Law* (1901), secs. 217, 252, 346, pp. 263, 299-301, 369; Twiss: *Law of Nations*, 2d ed. (1884), Vol. I, sec. 245, pp. 423-424; Ullmann: *Völkerrecht*, 2d ed. (1908), secs. 99-100, pp. 319-324; Vattel: *Droit des Gens*, 1758 (Chitty's English translation, edited by Ingraham, 1852), Bk. II, ch. 7, sec. 89, p. 168; Westlake: *International Law* (1904), Vol. I, pp. 60-62; Wharton: *Commentaries on American Law* (1884), secs. 149-150, pp. 228-229; Wheaton: *International Law* (Dana's ed., 1866), sec. 268; Wilson & Tucker: *International Law*, 5th ed. (1909), pp. 123, 152-153.

Although a servitude, as a recognized institution of Roman private law, is a prototype of international servitude, it is but natural that the servitude of public law should differ materially from the servitude of private law, because in the latter the relation is between individuals, whereas, in the former system the servitude is created by and exists only between states. In essence, however, the servitude of public or private law is a *jus in re aliena* as distinguished from an obligation, and the rules of private law for the creation, enjoyment, extinguishment, and interpretation of servitudes are of very considerable service in the consideration of international servitudes, although by virtue of the difference between the parties to the two classes of servitudes they are to be applied by analogy.

Although the analogy is well recognized by the authorities, the doctrine is sometimes stated in general terms without reference either to its origin or its analogy to Roman law. Thus, in Vattel's *Law of Nations*, first published in 1758, and which has since been the favorite handbook of diplomacy, if one may judge from the frequency of its quotation by men of affairs and state papers, it is said:^a

There exists no reason why a nation, or a sovereign if authorized by the laws, may not grant various privileges in their territories to another nation or to foreigners in general, since everyone may dispose of his own property as he thinks fit; thus, several sovereigns in the Indies have granted to the trading nations of Europe the privilege of having factories, ports, and even fortresses and garrisons in certain places within their dominions. We may, in the same manner, grant the right of fishing in a river, or on the coast, that of hunting in the forest, etc. * * *

When once these rights have been completely ceded, they constitute a part of the possessions of him who has acquired them, and ought to be respected in the same manner as his former possessions.

It will be noticed that the Swiss publicist does not enter into the technicalities or niceties of servitude, nor does he mention them by name, but he declares unequivocally the right which independent nations possess, by virtue of their independence, to grant "various privileges in their territories to another nation."

The development of the doctrine since Vattel's period will be seen by consulting the recent valuable work on international law, published in 1905 by Doctor Oppenheim, the present accomplished pro-

^a Vattel: *Law of Nations* (1758) (Chitty's translation with notes by Ingraham), Book II, ch. 7, sec. 89, p. 168.

fessor of international law at Cambridge University. Doctor Oppenheim thus deals with the subject of international servitudes: *

State servitudes are those exceptional and conventional restrictions on the territorial supremacy of a state by which a part or a whole of its territory is in a limited way made to perpetually serve a certain purpose or interest of another state. Thus a state may through a convention be obliged to allow the passage of troops of a neighboring state, or may in the interest of a neighboring state be prevented from fortifying a certain town near the frontier. (Sec. 203.)

Subjects of state servitudes are states only and exclusively, since state servitudes can exist between states only (*territorium dominans* and *territorium serviens*). (Sec. 204.)

* * * * *

The object of state servitudes is always the whole or a part of the territory of the state whose territorial supremacy is restricted by any such servitude. Since the territory of a state includes not only the land but also the rivers which water the land, the maritime belt, the territorial subsoil, and the territorial atmosphere, all these can, as well as the service of the land itself, be an object of state servitudes. Thus a state may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another state, or a right to lay telegraph cables through a foreign maritime belt, or a right to build and use a tunnel through a boundary mountain, and the like. * * *

Since the object of state servitudes is the territory of a state, all such restrictions upon the territorial supremacy of a state as do not make a part or the whole of its territory itself serve a purpose or an interest of another state are not state servitudes. The territory as the object is the mark of distinction between state servitudes and other restrictions on the territorial supremacy. Thus the perpetual restriction imposed upon a state by a treaty not to keep an army beyond a certain size is certainly a restriction on territorial supremacy, but is not, as some writers maintain, a state servitude, because it does not make the territory of one state serve an interest of another. On the other hand, when a state submits to a perpetual right enjoyed by another state of passage of troops, or to the duty not to fortify a certain town on the frontier, or to the claim of another state for its subjects to be allowed the fishery within the former's territorial belt; in all these and the like cases the territorial supremacy of a state *is* in such a way restricted that a part or the whole of its territory is made to serve the interest of another state and such restrictions are therefore state servitudes. (Sec. 205.)

Since state servitudes, in contradistinction to personal rights (rights *in personam*), are rights inherent to the object with which they are connected (rights *in rem*), they remain valid and may be exercised however the ownership of the territory to which they apply may change. Therefore, if, after the creation of a state servitude,

* Oppenheim: *International Law*, Vol. I, secs. 203, 204, 205, and 207, pp. 257-262.

the part of the territory affected comes by conquest or cession under the territorial supremacy of another state, such servitude remains in force. (Sec. 207.)

Two fellow-countrymen of Vattel, Messrs. Bluntschli and Rivier, considered at a later day the doctrine of international servitudes, and accepted without question the validity of the conception in international law.^a

German publicists of authority may also be cited as accepting and stating without hesitation or qualification the theory and practice of nations in the matter of international servitudes, among whom may be mentioned G. F. de Martens, Klüber, Heffter, Von Holtzendorff, and Von Ullmann.^b

To this list should be added the distinguished Austrian publicist, Von Neumann.^c

In like manner the French publicists accept the institution as established in international law, and write with fullness of its nature and character and the incidents belonging to it. The works of Pradier-Fodéré, Bonfils, and Despagnet, among those of the various French writers dealing with the subject, may be examined with profit.^d

The same doctrine is laid down by the Italian jurists, Fiore, Lomonaco, and Professor Diena.^e

The exposition of the subject by the last named of the Italian writers is very full and satisfactory.

The Russian publicist, Professor de Martens, treats at considerable length the subject of servitudes and bases its acceptance in inter-

^a Bluntschli: *Droit International* (1895), 5th ed., secs. 353-359, pp. 212-215; Rivier: *Principes du Droit des Gens* (1896), vol. 1, sec. 23, pp. 296-303; Rivier: *Lehrbuch des Völkerrechts*, 2d ed. (1899), p. 192.

^b G. F. de Martens: *Précis du Droit des Gens moderne de l'Europe*, edited by Vergé, vol. 1, sec. 115, pp. 313-315; Klüber: *Droit des Gens moderne de l'Europe*, secs. 137-139, pp. 194-198; Heffter: *Droit International de l'Europe*, French edition by Geffcken (1883), sec. 43, pp. 104-108; Von Holtzendorff: *Handbuch des Völkerrechts*, sec. 52, pp. 246-252; Von Ullmann: *Völkerrechts*, 2d ed. (1887), secs. 99-100, pp. 319-324.

^c Dr. Leopold F. Von Neumann: *Grundriss des heutigen Europäischen Völkerrechts*, 3d ed. (1885), sec. 13, pp. 31-33.

^d Pradier-Fodéré: *Traité de Droit International Public, Européen et Américain* (1885), Vol. II, secs. 834-845, pp. 395-406; Bonfils: *Manuel de Droit International Public*, 5th ed., edited by Fauchille (1908), secs. 339-344, pp. 189-192; Despagnet: *Cours de Droit International Public* (1905), secs. 190-192, pp. 204-207.

^e Fiore: *Nouveau Droit International Public* (1885), vol. 2, secs. 829-830, pp. 116-118; also vol. 1, secs. 380-381, pp. 336-338; *Diritto Internazionale Codificato*, 4th ed. (1909), secs. 1095-1097, pp. 428-429; Lomonaco: *Trattato di Diritto Internazionale Pubblico* (1905), p. 248; Diena: *Principi di Diritto Internazionale* (1908), pp. 125-129.

national law upon the inherent right of an independent state to the property within its boundaries. "It follows from this," he says, "that the sovereign power has authority to dispose of its international property and not merely to enjoy it, but burden it with different charges."^a

The doctrine of international servitude is also recognized by Spanish writers of repute. Reference is made to Olivart's *Tratado de Derecho Internacional Público*, fourth edition (1903), section 53, pages 368-372, wherein the doctrine is expounded in accordance with the views already set forth.

The distinguished writer, publicist, and diplomat, the late M. Charles Calvo, discusses the subject in his *Dictionary of International Law* (Vol. II, pp. 214-215) and in the third volume of his monumental treatise on international law, section 1583 (6th ed.), quoting, among other authorities, Klüber and Heffter, whose views have already been stated.

Finally, the doctrine is accepted, and stated in other English works of authority besides that of Oppenheim, notably Phillimore on *International Law*, Vol. I, third edition (1879), sections 277-283, pages 388-392; Twiss on *Law of Nations*, Vol. I, second edition (1884), pages 403-404; Creasy (*First Platform of International Law* (1876), sections 256-261); Hall (*Treatise on International Law* (1904), 5th ed., pages 159-160); Westlake (*International Law* (1904), Vol. I, pages 60-62).

In the United States the following authorities treat of servitudes in the same way: Wheaton (*International Law*, Dana's Edition (1866), sec. 268, citing Vattel and Martens); Halleck (*International Law* (1861), chap. iv, sec. 20, pp. 92-93); Taylor (*International Law* (1901), pages 263, 299-301, 369); Wilson & Tucker (*International Law* (1909), 5th ed., pages 123, 152-153).

It is thus evident that the doctrine of international servitudes is firmly established in international law and that writers, irrespective of nationality, expound and treat it as such in their various expositions of international law. The matter, however, does not rest there, for not only do writers on international law maintain the doctrine, but the practice of nations, which constitutes the one solid foundation for international law, furnishes innumerable instances from a period

^a *Traité de Droit International*, Vol. I (French translation by Léo, 1883), pp. 479-491, secs. 93-95.

anterior to the treaty of Westphalia, of the employment or the recognition of the institution by many if not all the civilized nations of the world.

The unbroken practice of nations from the treaty of Saint Julien in the year 1603 down to the present time, is set out in full by Rivier in his valuable work, to which reference will be made in the oral argument.^a

To the imposing résumé of the important agreements creating servitudes to be found in Rivier may be added some further examples taken from the recent practice of states. While the enlightened doctrine of neutrality may seem to place a limit to the creation of military servitudes as such, nevertheless nations are seeking in all parts of the world naval and commercial points to serve as coaling stations and bases of supplies in the event of hostilities as well as to serve economic purposes in time of peace.

The treaty of June 30, 1899, between Spain and Germany may be cited as proving by example that not only weak nations, but nations of the highest standing and power are willing to restrict their sovereignty in favor of nations inferior to them from a military and naval point of view. Thus in the treaty in question, Spain ceded the territorial sovereignty of the Carolines:

Spain cedes to Germany the full sovereignty over, and property of the Caroline, Pellew, and Mariana islands (except Guam), in return for a pecuniary indemnity of 25,000,000 pesetas (Article I).

The third article of the treaty permitted Spain to construct a coaling station in the Caroline Archipelago:

Spain will be allowed to establish and to keep, even in time of war, deposits of coal for her war and merchant fleets; one in the archipelago of the Carolines, another in the archipelago of the Pellew Islands, and a third in the archipelago of the Mariana Islands (Article II).^b

That is to say, Germany burdened the islands with an international servitude in favor of Spain.

By Article II of the treaty of November 18, 1903, between the United States and Panama the latter granted to the United States in perpetuity the use, occupation and control of a zone of land, and land under water, for the construction, maintenance, operation, sanitation and protection of said canal to the width of 10 miles ex-

^a Rivier: *Principes du Droit des Gens*, sec. 23, pp. 296-303.

^b British and Foreign State Papers, 1899-1900, Vol. 92, pp. 113-114.

tending to the distance of 5 miles on each side of the center line of the route of the canal to be constructed.

Article III of that treaty is as follows:

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

The sovereignty of Panama to all its territory, including the Canal Zone, is recognized, but it is perpetually burdened with the servitude in favor of the United States. The expression "servitude" is not used but the sovereign right of Panama to the specified territory is limited and burdened by the servitude to such a degree, that the United States displaces Panaman sovereignty for the purposes of the servitude and is authorized in express terms to extend its sovereignty to the territory in question and to perform all acts of a sovereign nature necessary for the full enjoyment and exercise of the servitude.

Again, by Article 9 of the treaty of Portsmouth, signed September 5, 1905, to establish peace between Russia and Japan, Russia ceded to Japan the southern portion of the island of Sakhaline, and the adjacent islands to the south of the fiftieth degree of latitude. At the same time, and by the same article, Japan and Russia mutually agreed not to construct in their respective possessions upon the island of Sakhaline and the islands adjacent thereto any fortifications or military works.^a

In the course of the same year, on October 26, 1905, Norway and Sweden concluded the convention of Stockholm, by the terms of which the contracting powers agreed to maintain neutrality within their frontiers, to dismantle the existing fortifications, etc., and not to construct fortifications, forts or military depots.^b

In view, therefore, of the theory and unbroken practice of states throughout a period extending over centuries the doctrine of servitudes may be considered to be firmly established in international law to such an extent that a refusal to apply the doctrine in a particular case

^a British and Foreign State Papers, 1904-1905, Vol. XCVIII, p. 735.

^b British and Foreign State Papers, 1904-1905, Vol. XCVIII, pp. 821, 824.

would be a departure from, and therefore a modification of, existing international law. .

The correctness of the analogy between the servitudes of Roman law and those of international law has been questioned by a few writers, among whom may be mentioned Jellinek and Nys. It is not deemed necessary to stop now to notice these writers, since they all recognize the practical adoption of the institution into international law, and it is the practice of nations, and not the theoretical correctness of conceptions on which they act, which constitutes international law.

The writers differ in theory as to the nature or character of the sovereignty which servitudes may limit. One school holds that it is only the sovereignty of the state in relation to its territory which may be limited; another school, that any limitation of sovereignty, short of its entire destruction, creates a servitude. Both schools agree, however, as to the essentials of a servitude, which in simple terms, adopting the theory of the first school as sufficient for the purposes of this case, may be defined as a grant of rights by one state to another, which restrict and limit the territorial sovereignty of the first state in favor of the second, to be exercised and enjoyed by the latter state, or to be exercised and enjoyed by the citizens or subjects of the latter state if the rights acquired be in reality for the benefit of its citizens or subjects.

In parting with the sovereign right of control, unless there be a reservation in fact or intent of the parties, the dominant state has acquired what the burdened state granted, namely, a sovereign right to be exercised by the dominant state independently of the grantor, in so far as the servitude requires such exercise. The right acquired is a real right, as distinguished from an obligation, that is to say, it is a right inhering in the soil and goes with the soil or territory burdened with it into whose hands so ever it may pass.

It is true, as stated by the writers, that a right of such a sovereign nature should be strictly interpreted, that is to say, that it should not be presumed without evidence, (*i. e.*, a treaty or other satisfactory evidence,) that a state has parted with the exclusive right to exercise territorial sovereignty within the burdened territory; but, as the grantor is sovereign in all respects in the territory in which the servitude is to be created it may grant or restrict its sovereignty absolutely or qualifiedly, for the greater includes the lesser.

The instrument creating the servitude is at once its origin and measure, and the express intent of the parties must govern. If the instrument is silent, it is to be presumed that the nation parted with a concurrent right unless an exclusive right is necessary to the enjoyment by the dominant state of the servitude. *In dubio pro libertate*. Therefore, should the exercise of the servitude by the dominant state be compatible with the concurrent exercise of the servitude right by the servient state, it should be presumed, in the absence of express words to the contrary, that the servient state meant to retain, and actually did retain, the right of exercise and enjoyment of the grant not inconsistent with the right secured by the convention to the dominant state.

Having thus considered briefly the origin and nature of servitudes, it is possible to group and classify the servitudes which have already been stated. For the purposes of the present discussion, omitting the so-called natural servitudes arising from the geographical situation of nations, as well as the general restrictions imposed upon the sovereignty of states in their necessary and mutual relations with each other as members of the family of nations, servitudes may be divided into negative or passive, active or positive.

To the first category belongs the duty of the servient state to abstain from certain acts which it otherwise would have the right to do had it not created the servitude. Such servitudes are said to consist in *non faciendo* and are negative, as the burdened state has parted with the right to act within its own territory. As examples of such servitude the following may be cited: The duty not to construct or reconstruct fortresses, not to transform a harbor into a port of war, not to receive war vessels within its ports, not to use its waters or certain of them for war or commercial purposes, not to inhabit and cultivate certain regions adjoining the frontier of the dominant state, not to exercise upon its territory certain rights of administration and jurisdiction. The sovereignty of a servient state is restricted in favor of another. It is not required to perform any act within the specified territory, but it is, however, forbidden to act, that is to say, its duty is to abstain.

To the second category belong *jura in re aliena*, by virtue of which the servient state is not merely bound to abstain from undertaking a particular line of action otherwise permissible but is required to permit the dominant state to take action within the burdened territory.

This class of servitude is said to consist *in patiendo*, and is positive in the sense that the dominant state possesses the right to do certain specified acts within the burdened territory, which the servient state is required to permit and may not forbid or deny.

The exercise of this right of a dominant state is not limited to state officials, but the servitude may be exercised by its subjects, and indeed it is often created for the express purpose that it shall be exercised by its subjects or citizens. As examples of this class of servitudes may be cited the right of the dominant state, with the permission of the servient state, to pursue and arrest upon the territory of the latter all fugitives, malefactors and deserters, and to exercise all the rights of justice and police; to construct and maintain depots, houses and warehouses, railroads, telegraphs, and to have custom houses, to enjoy military rights, and to exercise within the servient territorial waters military and sanitary police; to pass its troops over the territory, to occupy it, in whole or in part, with its forces, and to maintain garrisons in certain places; to permit the subjects, citizens or inhabitants of the dominant state to fish within its internal or coastal waters; to preserve and prepare fish upon its coast; to cut wood and to do acts of a like nature upon its territory.

Servitudes may be further classified according to the nature of the acts to be done or to be suffered, into military or economic servitudes, of which many examples have already been given in the passages quoted. While it may be said that military servitudes are on the decrease by reason of the requirements of neutrality, still the acquisition of coaling stations as bases of supplies in war time is not infrequent in modern times. Economic servitudes, however, are of the greatest importance and are likely to be frequently created in the future in the interest of commerce, traffic and intercourse in general. Thus, we have examples of economic servitude in the right to fish in foreign territorial waters, to build railways, or lay telegraph lines and cables over foreign territory. The servitude created by the treaty of September 3, 1783, between the United States and Great Britain affirmed, except where modified or restricted, by the convention of October 20, 1818, between the United States and Great Britain, is an example of an economic servitude, and the controversies arising out of its exercise have led to the present arbitration.

**THE EXTENT TO WHICH AN INTERNATIONAL SERVITUDE LIMITS
THE POWER OF THE SERVIENT STATE.**

From a consideration of the nature of international servitudes, as laid down by the writers generally, showing that they are real rights, vested permanently in the dominant state, surviving war, passing without impairment with the dominant and servient territories into whose hands soever they come, and restricting the territorial sovereignty of the servient state in favor of the dominant state, it may fairly be deduced that an international servitude limits the territorial sovereignty of the servient state to the extent that the full exercise of sovereign power by it is inconsistent with the full and perfect enjoyment of the servitude right by the dominant state.

Some servitudes limit territorial sovereignty entirely. Where the exercise of the right granted is inconsistent with any local jurisdiction, that jurisdiction is entirely withdrawn. Of this class are the military servitudes, giving a right of passage for armed forces.^a

The economic servitudes, however, such as railway, cable, and fishing rights, granted by one nation to another, being only partially inconsistent with the local jurisdiction, the latter is only partially withdrawn. For all purposes of police and other matters involving the integrity of the general laws, and not affecting the servitude, the servient state would retain control over persons connected with the enjoyment of the servitude, but it would have no power to limit or impair in any manner the exercise or enjoyment of the servitude. If an assertion of local power is found to conflict with the right or its exercise, or to burden it or in any way impair it, the power must give way and the right survive. This is necessarily so. Since it is an attribute of the right that it limits state sovereignty, there is no room for the application of state sovereignty to limit the right. The question in every case is, How far has the state consented to limit its sovereignty? And the answer in every case must be, So far as the right granted and its full exercise is inconsistent with sovereignty.

The authors collected below ^b discuss to a greater or less extent, respectively, limitations of sovereignty created by international servitudes in a way to sustain the deductions here drawn on principle.

^a Vattel: *Law of Nations*, Book 3, chap. 7, secs. 130-134. Hall: *International Law*, 5th ed., p. 199. Phillimore: *International Law*, 3d ed., vol. 1, p. 474. Halleck: *International Law* (1861), Ch. VII, sec. 25, p. 171.

^b Chrétien: *Principes de Droit International Public*, sec. 259, p. 268. De Martens: *Traité de Droit International*, vol. 1, sec. 93. Von Holtzendorff: *Handbuch des Völkerrechts*, vol. 2, sec. 52. Heffter: *Le Droit International de*

Those who have discussed the matter with both care and fullness are Klüber, Dr. Alphonse Rivier, Heilborn, Clauss, Von Neumann, Pradier-Fodéré, and Von Ullmann. These latter authors leave no room for doubt that the dominant state exercises its servitude right independently and with entire freedom from the control of the servient state, and that the latter retains no power to do anything which in fact impairs, interferes with, or burdens in any manner the exercise or enjoyment of the servitude.

THE TREATY RIGHT IN THIS CASE POSSESSES THE ESSENTIAL ELEMENTS OF AN INTERNATIONAL SERVITUDE.

The three essentials of an international servitude, as laid down by the authorities, are (1) that it be created by one state for the benefit of another state; (2) that its permanency must be beyond the control of the state by which it is created; (3) that it make the territory or a part of the territory of one state serve a purpose or an interest of another state. All these essentials are present in the grant to the United States by Great Britain of the fishery right, made by the treaty of 1818.

First. The treaty carries a grant from one nation to another. There is, therefore, no warrant for treating the right as a mere concession to individuals, as the British Case attempts to do. The United States can only enjoy a fishery right through its inhabitants, and if the grant had been to the United States, without mention of its citizens or inhabitants (a form it is believed, never employed in granting economic servitudes) the necessary construction would have been that the grant was to the United States for the benefit of its inhabitants. Moreover, in its final analysis, the inhabitants of the state are the state, and the ultimate sovereignty in a republic, however it may be considered with reference to other forms of govern-

l'Europe, sec. 43. Bluntschli: *Droit International*, sec. 355, p. 212. Despagnet: *Cours de Droit International Public*, sec. 190. Pradier-Fodéré: *Traité de Droit International Public, Européen and Américain*, secs. 834-838. Gareis: *Institutionen des Völkerrechts*, p. 205. Rivier: *Principes du Droit des Gens*, sec. 23. Diena: *Principi di Diritto Internazionale*, p. 125. Fiore: *Diritto Internazionale Codificato* (4th ed., 1909), sec. 1096. Oppenheim: *International Law* (1905), sec. 203-205. Clauss: *Lehre von den Staatsdienstbarkeiten*, pp. 114-198, 224, 225, 226, 227. Klüber: *Droit des Gens Moderne de l'Europe*, Ott's 2d ed., sec. 137, pp. 194, 195. Dr. Alphonse Rivier: *Lehrbuch des Völkerrechts*, 2 ed., p. 192. Heilborn: *System des Völkerrechts, entwickelt aus den Völkerrechtlichen Begriffen*, 1896, pp. 30-34. Von Neumann: *Grundriss des heutigen Europäischen Völkerrechts*, 1885, sec. 13, pp. 31-33. Von Ullmann: *Völkerrecht*, 2 ed., 1908, secs. 99-100.

ment, resides in the body of the people of the republic; so that a grant to the entire body of the inhabitants of the United States, made by and through a treaty with the Government of the United States, must be, in substance and effect, and in fact, a grant to the United States.

The French fishery right on the Newfoundland coast created by the treaty of 1713, was, "to the subjects of France," as likewise was its renewal by the treaty of 1763, and by the treaty of 1783. It has never been claimed that Great Britain and France were not the real parties in interest under those treaties, and that they did not confer upon France a national right.

The authors below^a specifically point out that it is a matter of no importance whether it be the states or their subjects who are to enjoy the servitudes.

Second. The right granted is one in perpetuity. The treaty so declares.

Third. It is a right to make a part of the territory of Great Britain serve a purpose and an interest of the United States, and is, for that reason, a restriction of the territorial sovereignty of Great Britain, thus answering the requirement of those publicists who deny that a restriction of sovereignty generally can constitute an international servitude, and at the same time meeting the requirement of the others, whose theory of the nature of the sovereignty which may be limited is so broad that it obviously includes limitations of territorial sovereignty.

The French and American fishing rights under the several treaties with Great Britain, and grants generally to one nation to make use of the maritime belt of another nation, as well as grants to cut wood on the land, possess these and other essential requisites of international servitudes.^b

^a Heffter: *ibid.*, sec. 43; Rivier: *Lehrbuch ibid.*, p. 192; Neumann, *ibid.*, sec. 13, p. 31; Pradier-Fodéré, *ibid.*, sec. 837; Fiore, *ibid.*, vol. 2, sec. 829; Rivier, *ibid.*, Principes du Droit Gens, sec. 23; Clauss, *ibid.*, p. 204; Hollatz: *Begriff und Wesen der Staatsservituten*, p. 49.

^b Hall, *ibid.*, pp. 159-160. Mérignac, *ibid.*, vol. 2, 366-370 Von Liszt: *Völkerrecht*, 5th ed. (1907), p. 74. Olivart, *ibid.*, vol. 1, sec. 53. Chrétien, *ibid.*, sec. 260, p. 366. (Newfoundland fishery and English right to cut dyewood in Honduras.) Von Ullmann, *ibid.*, sec. 99. Heffter, *ibid.*, sec. 43 (referring to English right to cut dyewood). Von Holtzendorff, *ibid.*, sec. 52, p. 246. Alphonse Rivier: *Lehrbuch, ibid.*, 194. Vattel, Chitty's translation, *ibid.*, Book 2, chap. 7, sec. 89, p. 168. Wharton's *Commentaries, ibid.*, sec. 149. Wilson and Tucker, *ibid.*, sec. 55, b. pp. 122, 123, 124. Bonfils, *ibid.*, sec. 342. Despagnet, *ibid.*, sec. 190. Oppenheim, *ibid.*, secs. 205-206. Fiore: *ibid.*, sec. 1095, p. 428. Rivier, *ibid.*, sec. 23. Diena, *ibid.*, p. 125. Clauss, *ibid.*, pp. 225-226.

THE TERMS, "LIBERTY" AND "IN COMMON."

EXAMINATION OF THE TREATY OF 1818.

It is proposed now to examine the treaty of 1818 and determine whether any of its provisions, either directly or by necessary implication, reserve to Great Britain the right to make laws or regulations limiting the exercise by inhabitants of the United States of the fishing right conferred by that treaty. A question is raised in the British Case as to the use of the word *liberty* in the treaty, although apparently no great reliance is placed upon it. The main contention of Great Britain has been and is that the grant of the fishing right to inhabitants of the United States "in common with subjects of His Britannic Majesty," implies a reservation of power in Great Britain to make limiting regulations. It is necessary, therefore, to consider the proper meaning to be attached to the words *liberty* and *in common* respectively.

Before proceeding to a consideration of the meaning of those terms, it is conceded that treaties creating international servitudes are to be strictly construed, that is to say, that the measure and extent of the rights which are claimed as a servitude are to be ascertained by the rule of strict construction. The rule is based on the principle that derogations from sovereignty are not implied, and therefore must be clearly shown.

By the term *strict construction* is understood a construction which is conformable to both the letter and the spirit of the instrument being construed. The rule of strict construction does not require the application of different canons of construction from those applied under any other rule, and it means simply that when the process of interpretation has ended, if a word, a phrase, or a sentence, the sense of which is disputed, be equally susceptible of a broad or a narrow meaning, the latter is the one to be preferred. It is not the object of interpretation and construction, whether it be strict or liberal, to bend, twist, or shape the text, but simply and solely to fix upon the true sense, whatever that may be; to give to words the sense which they ought to have according to good faith, common sense, and the use which the negotiators made of them. Common sense and good faith are the chief guides for all genuine interpretation. This excludes a broad and latitudinarian construction intended to embrace cases not

clearly within the language employed and also a resort to verbal niceties and forced construction to avoid cases clearly within the scope of the language employed. The object in the end is to discover the true sense in which the words were used. These principles will be found stated with fullness and precision in the text-books and cases cited below.^a

MEANING OF "LIBERTY."

The British Case referring to the term "Liberty," says: "The term liberty as here used, is equivalent merely to permission. It is true that when granted by treaty it became as between Great Britain and the United States a matter of right, but there can be no question as to the extent of what was granted."^b

The United States does not agree that the word *liberty* when used in connection with the grant of an incorporeal hereditament has ever been construed as "equivalent merely to permission," but in view of the admission in the British Case that when granted by treaty it became as between Great Britain and the United States, a matter of right, the United States feels relieved of the necessity of going into an exhaustive discussion of the meaning of the term. By the common law of England, the word *liberty* has always been synonymous with the word *franchise*, but it has been applied to a peculiar form of franchise—to grants of incorporeal hereditaments in the nature of franchises out of the King's prerogatives, made by the Crown to subjects, and it included grants of a forest, park, warren, or fishery.^c

It was natural, in view of the well-known use of the term in English and American law, that the British negotiators should prefer to employ in and about a grant of a right of fishery by the Crown of Great Britain, the technical terms by which such grants

^a *Legal and Political Hermeneutics*, Francis Lieber, chap. I, sec. VIII; chap. III, secs. VII and VIII; chap. IV, sec. III to sec. XVII, inclusive. Sutherland on *Statutory Construction*, secs. 347, 348, and 349. Sedgwick on *Statutes and Constitutions*, chap. VII, p. 291, et seq. *Stephenson v. Higginson* (9 H. L. Cases, 685). *Attorney-General v. Sillem* (2 H. C., 351). *Barber Asphalt Paving Company v. Watt* (51 La. Ann., 1345). *Warner v. Connecticut Mutual Life Insurance Co.* (109 U. S., 357). *In re Ross* (140 U. S. 475). *United States v. Hartwell* (6 Wallace (U. S.), 395).

^b British Case, 47.

^c *Jacobs Law Dictionary* (English, 1811) title, Franchise, vol. III, pp. 122 et seq. *Burns Law Dictionary* (English, 1792) title, Franchise, pp. 384 et seq. *Williams Law Dictionary* (English, 1816) title, Franchise. *Potts Law Dictionary* (English, 1803) title, Liberty. *Blackstone's Commentaries*, book 2, p. 37.

had uniformly been carried, and it was not unnatural that the American negotiators who were as familiar with the meaning of such terms as were the British, should accede to the use of the technical terms. We find accordingly, from the statement of John Adams, that this consideration was the one which governed the use of the word liberty in the treaty of, 1783. "They said it (the use of the word liberty) amounted to the same thing, for liberty was right and privilege was right; but the word *right* might be more unpleasant to the people of England than *liberty*, and we did not think it necessary to contend for a word."^a

The treaty of 1818 but followed that of 1783 in the use of the word liberty, and the term was employed by the American negotiators in the first draft of the treaty of 1818 proposed by them, and was admitted by them in the subsequent British draft, pursuant to the principle upon which they were conducting the negotiations, namely, that they could not demand more and would not accept less in point of right (although they would accept less in extent of coast) than had been before enjoyed by the Americans under the treaty of 1783.

Great Britain has never denied that the French fishery on the Newfoundland coast was a fishery as of right. That right was described as follows by the treaty of 1713, between France and Great Britain:

But it shall be *allowed* to the subjects of France to catch fish and to dry them on land, in that part only, and in no other besides that, of the said island of Newfoundland, which stretches from the place called Cape Bonavista, to the northern point of said island,^b etc.

In the treaty of 1763 between the same powers, the right is described thus:

The subjects of France shall have the *liberty* of fishing and drying, on a part of the coasts of the island of Newfoundland, such as is specified in Article XIII of the treaty of Utrecht, which article is renewed and confirmed by the present treaty.^c

Here the right is described as a *liberty*, but referred to as a renewal of the right conferred by the treaty of 1713, which treaty in conferring the right employed the words "it shall be allowed."

In the treaty of 1783 between the same powers, the French fishery right is referred to as, "the fishery assigned to the subjects of His Most Christian Majesty," and the article concludes, "the French

^a U. S. Case, p. 31; Appendix, 318.

^c U. S. Case, Appendix, 52.

^b U. S. Case, Appendix, 51.

fisherman shall enjoy the fishery which is assigned to them by the present article, as they had the right to enjoy that which was assigned to them by the Treaty of Utrecht."^a

There can be no doubt that each of these treaties conveyed a right as fully as if the word "right" had been employed. International agreements, as before stated, are covenants in good faith and are to be equitably and not technically construed.

Mr. John Quincy Adams, in one of his letters to Lord Bathhurst, said with force and truth: "The undersigned is persuaded it will be readily admitted that wherever the English language is the mother tongue the term *liberty* far from including in itself either limitation of time or precariousness of tenure, is essentially as permanent as that of *right*."^b

Lord Bathhurst, in his reply to Mr. Adams, did not controvert this statement, but merely pointed out that the words *liberty* and *right* were placed in opposition to each other in the treaty of 1783, and therefore were to have attached to them different degrees of right in the sense of their permanency. It is not necessary in this connection to controvert that observation. But the United States submits confidently that the word *liberty* when employed alone in a grant or concession is as broad and comprehensive a word as right, and conveys and assures the faculty of doing the thing granted, upon as full and ample tenure without limitation or reservation, as if the word right had been employed.

The two Governments in subsequent treaties, have treated the two words as convertible terms. In the treaty of 1854 the American fishing right, under the treaty of 1818, is spoken of as "the right of fishing on the coasts of British North America," etc.^c In the treaty of 1871 it is spoken of as "the *liberty* secured to the United States fishermen," etc.^d

MEANING OF "IN COMMON."

The claim of an unlimited right by Great Britain to make regulations based on the use of the words *in common* is thus stated in the British Case:

The liberty granted is expressed to be a liberty "in common," with British fishermen. Now there can be no pretense that British fish-

^a U. S. Case, Appendix, 53.

^b U. S. Case p. 29; Appendix, 283.

^c U. S. Case, Appendix, 26.

^d U. S. Case, Appendix, 29.

ermen are not subject to the sovereign power of His Majesty and these words show that American fishermen are to have the same liberty as British fishermen, but no more. If they were to have the liberty free from the control of the sovereign power, the liberty to fish at any time or at any season, in any place, and with any kind of a net or other instrument, then it is evident that they would not have a common liberty, but a liberty much greater than that enjoyed by British fishermen.^a

Again:

It was merely permission to fish, in common with British fishermen, and was necessarily subject to the right of regulation by the Government of the country, inasmuch as, in the absence of such regulation, the subject-matter of the grant might itself be destroyed.^b

The United States submits that the liberty to fish carried by the treaty of 1818, was an unlimited liberty, and that the office of the words, "in common with subjects of his Britannic Majesty," was not to limit the American right to such liberties as Great Britain then allowed to British subjects, or might thereafter allow, in the matter of fishing, but to evidence that the liberty was one held equally by the fishermen of the two countries and to be enjoyed by neither to the exclusion of the other. The words *in common* have no such meaning as that attributed to them by Great Britain, but have the precise meaning attached to them by the United States. Moreover, the history of the transaction, as well as the construction mutually accepted for many years, shows conclusively that the words were understood and used in the sense claimed by the United States.

This does not mean that American fishermen would have a greater liberty than that enjoyed by British fishermen. If any such result shall be brought about it will be because Great Britain, refusing to act in concert with the United States in regulations necessary for the preservation of the fisheries, and for the fair exercise of the fishing right by the fishermen of the two countries, insists on making such regulations alone and thereby binds only her own nationals. Nor does it follow that the subject-matter of the grant might be destroyed for want of regulations for its preservation if any should prove to be necessary.

As stated by Mr. Root in his discussion on this subject in the controversy of 1906:

"This Government is far from desiring that the Newfoundland fisheries shall go unregulated. It is willing and ready now, as it has always been, to join with the Government of Great Britain in agree-

^a British Case, 46.

^b British Case, 47.

ing upon all reasonable and suitable regulations for the due control of the fishermen of both countries in the exercise of their rights, but this Government can not permit the exercise of these rights, to be subject to the will of the Colony of Newfoundland."^a

No insuperable difficulty has ever been experienced so far as history records in respect of matters of joint administration by nations, nor in the management and control of property rights held by individuals in common under municipal law. Where the authority is admittedly joint, self-interest, aided by a spirit of reasonable concession, should produce agreement. A common right, therefore, between two civilized nations will never be destroyed, nor its fair, mutual enjoyment, seriously impaired, for want of common accord between them respecting fair, just, and proper regulations.

GRAMMATICAL AND COLLOQUIAL MEANING OF "IN COMMON."

The English lexicographer recognized as a standard authority in Great Britain and the United States in 1818, was Johnson, whose great work was first published in 1755 and passed through a number of editions, ending with an American edition published by Moses Thomas in Philadelphia in 1818.

The definition of the word *common*, when employed as a descriptive adjective in connection with property or property rights, given in each and every edition of Johnson's Dictionary, including the American edition of 1818, was, "belonging equally to more than one." The same definition of the word is found in Bailey, 1764; Fleming, 1771; Kenrick, 1773; Ash, 1775; Barclay, 1782; Sheridan, 1790; Perry, 1805, and Walker, 1807.

As early as 1735 the word *common* had come to have substantially this meaning attached to it. In Defoe's Dictionary published in that year, the word is defined: "Ordinary; public; also that which belongs to all alike."

The words, *in common*, as expressing a composite idea or meaning, were also defined by Johnson and followed by other standard lexicographers of that day. In the first and each succeeding edition of Johnson is found:

In common:

1. Equally to be participated in by a certain number.
2. Equally with another; indiscriminately.

^a U. S. Counter Case, p. 40.

This definition was followed by Bailey, 1764; by Kenrick, 1773, Perry, 1805.

It will thus be seen that the words *in common* when used as a descriptive adjective in connection with a property right, had no other meaning in 1818, and, it may be added, have no other meaning at the present day than that of equality. Equality necessarily implies a negation of exclusiveness, and hence the words, as heretofore stated, have no other meaning than that the liberty of fishing granted was one to be held and enjoyed equally by the fishermen of the two countries, and therefore, necessarily, by neither to the exclusion of the other.

MEANING OF "IN COMMON" AS A TERM OF ART.

The United States might well content itself with this evidence of the meaning of the words *in common*, but the words constituted a term of art in 1818 well known and understood by all who were conversant with the common and identical laws of the two nations. They were applied by those laws to grants of fishery rights to indicate a common and equal right as opposed to a several or exclusive right.

The words were applicable to two classes of fisheries known to and distinguished by the common law of England. The first of these classes comprised the fisheries in the navigable waters of the realm by which was to be understood only the tide waters. These fisheries belonged to the Crown, but in the absence of grant were enjoyed as of right by all the subjects *in common*. An individual, however, might have an exclusive right of fishing in the navigable waters or some part thereof, by grant from the Crown, and also by prescription, which presupposed an original grant from the Crown.

In rivers not navigable and other interior waters, the fisheries belonged to the owners of the soil or the riparian proprietors. In this class of fisheries, the right of fishing might be detached from the ownership of the bed and banks of the stream and be thereafter held separate and apart therefrom as a property right. When held by the riparian proprietor in connection with the soil, the fishery was a several fishery, which was exclusive of all the world. When granted away separate from the soil, it might be several and exclusive, or a common fishery, according to the terms of the grant.

Lord Hale in speaking of the presumptive right of the owner of land on both sides of a stream to fish therein remarks:

But special usage may alter that common presumption for one man may have the river, and the others the soil adjacent, or one man may have the river and the soil thereof, and another the free or several fishing in the river.^a

Lord Coke says:

A man may prescribe to have *seperalem piscariam* in such water and the owner of the soil shall not fish there. But if he claim to have *communiam piscariæ* or *liberam piscariam* the owner of the soil shall fish there.^b

And again:

In the technical sense of the words a common (or right of common) is the right of taking some part of any natural product of the land or water belonging to another man in common with him. Therefore, the right to take the whole of the product or to exclude the owner from taking it is not a common although sometimes called a sole common—but an estate in land; for it is against the nature of this word common and it was employed in the first grant that the owner of the soyle should take his reasonable profit therein.^c

A fishery also may be said to be a free tenement either several or in common in a man's own grounds, as if anyone possessed land on both sides of the waters, near the bank, here he may fish without the hindrance of any as his own free tenement and etc. So it is again, if he possesses only the land on one side of the water, then he may fish to the middle line of the stream, unless by chance he has imposed a service on his lands so that another may fish with him, and so, *in common*; or that another may fish by himself out of the whole; or again, that anyone should have imposed upon himself a service so that he could not fish.^c

It would not be of value to enlarge on the general doctrine of the common law of England relating to fisheries, since the only object of referring to it at all is to show that the words *in common* when employed in connection with a fishing right, whether in public navigable waters, or in waters susceptible of private ownership, have an established meaning known to that law, and therefore, known to the negotiators of the treaty of 1818, on both sides.^d It will suffice to state the distinction as to the several kinds of fisheries laid down by the commentators of repute on both sides of the water for the purpose of showing what is indisputably the fact, that while there were several kinds of fisheries known to that law, as *free*, *several*, and *common*, and there was some confusion in early days concerning the

^a *Harg. Law Tracts*, 5.

^b *Co. Litt.* 122a.

^c Bracton's *De Legibus et Consuetudinibus Angliæ*, book 4; cap. 28, sec. 4; 3 Twiss, p. 374-375.

^d U. S. Case, p. 63.

nature of a free fishery and whether it was exclusive or not, and also whether a separate fishery which was admittedly exclusive could be held and enjoyed as a property right separate and apart from ownership of the soil, the principal distinction was between exclusive fisheries which were denominated by some authors free and several and by others several alone, and fisheries not exclusive which were denominated by all, fisheries *in common*.^a

The recent and valuable English publication of Stuart A. Moore and Hubert Stuart Moore states the matter thus:

Woolrych, *Law of Waters* (p. 110), divides fisheries into four classes, over and above the common or public fishery in the sea, viz.: (1) Several fishery, (2) free fishery, (3) common of fishery, (4) fishery in gross.

The last-named fishery, fishery in gross, he says, may be more properly referred to several fishery or common of fishery; for, if it be granted to a person exclusively of others what is it but a several fishery, and if in common with other individuals, how does it differ from a fishery in gross? Therefore, there remains only "several," "free," and "common of fishery." Now, it would appear that several and free are all one so that this classification is reduced to two classes, which comprehends all the others, viz.: (1) Exclusive fisheries; (2) fisheries not exclusive, usually called commons of fishery.

1. Exclusive fisheries are those in which one has the sole and exclusive right of fishing either by reason of the ownership of the soil and its profits, or because the right of fishing is derived from the owner of the soil. These fisheries in both tidal and non-tidal waters, are sometimes described as several and sometimes as free. * * *

2. Fisheries not exclusive or common of fishery are of two kinds, viz.; "common fishery," or "common of fishery." "Common fishery" is the right of the public to fish in waters not apportioned as exclusive waters. "Common of fishery," is (a) where the owners of the exclusive right in two halves of a river fish in common between themselves over the whole river, each being owner of the soil of the river to the midstream; or (b) where the right to fish in the water has been granted by an owner of the exclusive fishery to one or more persons who fish *in common* with him, either all over the extent of the river or over particular parts of it.^b

The law was thus declared by a distinguished English judge in a comparatively recent case:

This is more of the confusion which the ambiguous use of the word "free" has occasioned from as early as the Yearbook 7, Henry VII, folio 13, down to the case of *Holford v. Bailey*, when it was clearly shown that the only substantial distinction with respect to fisheries is between an exclusive right of fishery, usually called

^a Blackstone, *Commentaries*, Book 2, pp. 39-40. Kent: *Commentaries*, Vol. 3, pp. 410-411. Woolrych, *Waters and Sewers* (1830), pp. 55, 96-97-101. Washburne: *Easements and Servitudes*, 3 Ed., pp. 522-523-524.

^b *The History and Law of Fisheries*, Stuart A. Moore and Hubert Stuart Moore, pp. 34-35-36.

“several,” sometimes “free” (used as in free Warren) and a right in common with others usually called common of fishery; sometimes “free” (used as in free port).^a

It will be seen from the foregoing that the words *in common* when employed in connection with a fishery right have one meaning, and one meaning only by the common law of England and the United States, and that is that the grant is not exclusive but is to be held equally with and in common with another or others. In the sense of the common law therefore the words *in common* are used as opposed to singular or exclusive. There is no permissible use of the words from which can be gathered an intention to limit the fishery right granted, to the manner, or means, or times of fishing, which the grantor himself might employ. The United States confidently submits in view of the foregoing that the meaning and the only meaning of the words under consideration was that the right of fishery granted and secured to the Americans was to be an equal and not an exclusive right, a right to be shared in by the fishermen of both nations conjointly and on equal terms.

Where such a term having a meaning well known to two nations making such a treaty is employed by them the canons of construction require ordinarily that the known and accepted meaning of the term in the two nations be adhered to.^b

Since the words we are considering were employed in and about the establishment of a fishing right which was to be equal between the two nations, it is reasonable to suppose that the parties would employ the same phraseology to establish and define the right which their common laws and customs would make appropriate as between individuals; and we derive from this consideration another reason for attaching to the words their technical legal meaning, on the principle that, “we ought always to fix such meaning to the expressions as is most suitable to the subject-matter in question.”^c

THE BRITISH CONTENTION AS TO THE MEANING OF “IN COMMON.”

In view of the undoubted meaning of the words in question it is difficult to understand the contention of the British Case, that the

^a Mr. Justice Willes in the case of *Malcolmson v. Oden*, 10 H. of L. cases, 593. See also to the same effect, *Holford v. Bailey*, 53 Q. B., 2/26.

^b Vattel, *ibid.*, Book 2, chap. 17, sec. 276; Grotius, Book 2, chap. 16, sec. 3.

^c Vattel, *ibid.*, Book 2, chap. 17, sec. 280.

grant *in common* of the right to fish with the subjects of Great Britain necessarily implies subjection to the laws of Great Britain regulating the fisheries. The idea is repeatedly advanced but is nowhere elaborated, and one is left in the dark as to the grounds on which Great Britain thinks it may be maintained.

That it can not rest on any meaning given to the words by the lexicographers of the day nor upon their meaning as a term of art in the laws of the two countries has already been shown.

That it can not properly rest on an implied reserved sovereignty in a nation to subject such a grant as that under consideration to limiting regulations, has likewise been shown.

The arguments of the British Case *ab inconvenienti* as that, if not subject to exclusive British regulations, American fishermen would enjoy a much greater liberty than British fishermen, and that if not subject to such regulations the fisheries might be destroyed, have also, it is maintained, been shown to be without substantial foundation.

The British argument so far as it is based on the idea that the use of the words "in common with subjects of His Britannic Majesty" necessarily implies that American fishermen were to have no greater rights of fishing than Great Britain might from time to time allow to her own fishermen, confuses the conception of right as expressed in the treaty with that of the exercise of the right. The words *in common*, it is submitted, merely fix the equality of the right and carry no implication that one of the owners more than the other may limit the exercise. This is the grammatical and colloquial sense of the words, as well as the sense in which they are employed in the grants of rights to be held *in common* by the common law of England, and hence such words when employed have no reference to the exercise of the right and no qualifying effect on the right itself, but are in the nature of a reservation preserving to the grantor an equal right. The words *in common*, therefore, carry the idea of equality of right but they bear no meaning such as that contended for by Great Britain that one of the parties to the common right may, by the enjoyment which he permits to himself of the right, measure the enjoyment of the right which may be permitted to the other party. Whatever this fishery was in its natural extent and value, in geographical area, and its multitude and plentitude and variety of food fishes, that it was of which Great

Britain possessed the *jus disponendi* and to which the United States proposed to acquire a right *in common*. That Great Britain proposed to grant the fishery or the United States to accept it, in any less dimensions than Great Britain had power to convey it, or than by the natural description it could and did convey it, is a proposition so preposterous that it is hardly necessary to refer to the grammatical or colloquial sense of the words or to their technical meaning to refute it; still, it is gratifying, when those sources of learning are explored, to find that they sustain so fully the contention of the United States. In the view of the United States there is as much ground for the contention that the Americans may limit the British right as that the British may limit the American right. The words *in common* mean equality of right, but there would be no equality if one party could exercise the right in full measure or to a limited extent only at its pleasure, while the other party had no such full liberty, but must conform its exercise of the right to that prescribed for itself by the other party.

While the United States does not admit that the words *in common* are at all ambiguous, yet if they be so considered, a resort to the process of interpretation and construction will, it is confidently believed, confirm the sense of their meaning contended for by the United States.

THE BRITISH CONSTRUCTION WOULD LEAD TO INADMISSIBLE RESULTS.

The principle that the words *in common* imply that American fishermen are to be governed in the exercise of the right of fishery, by limitations placed by Great Britain on British fishermen would carry the power of limitation to a point where the right would be held at the mere will and pleasure of Great Britain. If the words imply a power to impose limitations, then the limitations need not be imposed in aid of the preservation of the fisheries or of the fair exercise of the fisheries by both nations, but they may be imposed in aid of any other policy of Great Britain, local or national.

Reference will be made in another connection to the temptation, to which the local authorities are subjected, to make regulations ostensibly in the interest of the preservation of the fisheries, which are one-sided and disadvantageous to their rivals, but may be defended

on plausible grounds as reasonable and beneficial. The proposition now insisted on is that if an implied power of limiting and restraining the American fishing right is to be deduced from the words in question, the power of limiting and restraining that right is not confined in principle to regulations for the preservation of the fisheries, but may be extended to any clog, burden or restraint which Great Britain sees fit to impose in aid of any other policy; and hence, if the United States by virtue of those words took for its inhabitants such rights only as might be permitted by Great Britain to her own subjects, the power of Great Britain to limit and restrain the exercise by American fishermen of the right to fish is subject to one condition only, namely, that she must limit and restrain her own fishermen to the same extent. The United States would then be subject to any self-denying ordinance Great Britain might see fit to impose without reference to its object or purpose and whether well or ill conceived.*

The argument of Great Britain drawn from the use of the words *in common* necessarily and at once compels this result, a result impossible to conceive of as within the contemplation of the two nations. If it could be thought that the British negotiators had such a result in mind it is impossible to conceive that the American plenipotentiaries would have accepted a fishing right so empty and valueless.

INTERPRETATION AND CONSTRUCTION BY THE PARTIES.

CONSTRUCTION OF UNITED STATES SUSTAINED BY NEGOTIATIONS PRECEDING THE TREATY.

The protocols and diplomatic correspondence leading up to the treaty of 1818 show beyond question that the words of the treaty were not employed by the negotiators in the sense now claimed for them by Great Britain.

The fishing rights secured to the inhabitants of the United States by the treaty of 1783 were not limited by words from which a right of regulation by Great Britain might have been deduced. This is important to be remembered. The American negotiators of the treaty of 1818 approached their work imbued with the American

* U. S. Case, 222.

view that the fishery in its entirety as conceded by the treaty of 1783 was of a character and held on a tenure which made it enduring and not subject to the vicissitudes of war. They were furnished with all that had been said and written on the subject, and, while authorized to accept a less extent of coast than that provided in the former treaty, were expected to secure whatever extent of fishing might be agreed upon in terms which would conform to the American contention as to the former right.

Their guiding star was the following declaration of Mr. Adams contained in his letter of September 25, 1815, to Lord Bathurst:

Upon this foundation, my lord, the Government of the United States consider the people thereof as wholly entitled of right to all the liberties in the North American fisheries which have always belonged to them; which, in the treaty of 1783, were, by Great Britain, recognized as belonging to them; and which they never have, by any act of theirs, consented to renounce. With these views, should Great Britain ultimately determine to deprive them of the enjoyment of these liberties by force, it is not for me to say whether, or for what length of time, they would submit to the bereavement of that which they would still hold to be their unquestionable right. It is my duty to hope that such measures will not be deemed necessary to be resorted to on the part of Great Britain; and to state that if they should, they can not impair the right of the people of the United States to the liberties in question, so long as no formal and express assent of theirs shall manifest their acquiescence in the privation.^a

The first draft proposal concerning the fisheries came from the American negotiators and was presented by them at the third conference and there was little variance between that draft and the article finally agreed on, either in substantial terms or in phraseology.

The draft was accompanied by the explanatory memorandum before mentioned, which was never neutralized by a contrary British memorandum.

The language of the American draft, it will be remembered, in the words employed to describe the character of the estate and to secure the fixity of its tenure was, "It is agreed that the inhabitants of the United States shall *continue to enjoy unmolested* forever the liberty to take fish," etc.

The British counter project, in its words of estate and tenure, was: "It is agreed that the inhabitants of the United States shall have liberty to take fish," etc.

The words of the article finally agreed on were: "It is agreed that the inhabitants of the United States shall have forever, in com-

^a U. S. Case, Appendix, 272.

mon with the subjects of His Britannic Majesty, the liberty to take fish," etc.

It will be seen that the essential words of the American draft were carried into the treaty except those implying that the right granted was in continuance of the former right. The American negotiators could afford to dispense with them since they had secured the word *forever* and had reinforced it with the memorandum to which the British plenipotentiaries had made no rejoinder.

The words "in common with the subjects of His Britannic Majesty" not in either of the draft projects, appear for the first time in the completed article in connection with the words of tenure.

The American negotiators had declared that whatever extent of fishing ground might be secured to American fishermen, they were not prepared to accept it on a tenure or on conditions different from those on which the whole had theretofore been held, and to evidence that the right taken was on the same tenure and conditions as the prior right, they proposed and insisted on inserting in the treaty, the renunciatory clause therein found, with the twofold view of preventing any implication that the fishery secured was a new grant and of placing the permanence of the rights secured and of those renounced on the same footing, and also of expressly stating that the renunciation extended only to the distance of three miles from the coast.^a

This assertion that the new right must be on the same tenure and conditions as the old one, followed the proposal of the British plenipotentiaries, at the fifth conference before noted, of a form of stipulation as to the fisheries, from which the words *in common* were absent, and in which the liberty of fishing was carried by the words, "it is agreed that the inhabitants of the United States shall have the liberty to take fish of every kind," etc. The completed article, brought in by the British plenipotentiaries at the seventh conference and accepted by the United States, included the words *in common*, etc. They were accepted because they were precisely suited, when used in connection with words of perpetuity, to secure under the principles and practice of the law common to both countries, that which the American negotiators had declared it was indispensable they should have, namely, a renewal of fishing rights on a

^a U. S. Case, 59-66; Appendix, 307.

tenure and on conditions exactly similar to those on which it was insisted the United States had held and enjoyed the prior fishing right, namely, that they should have for their people on the limited coasts agreed on, a perpetual and indefeasible right in the fisheries equal in every respect to that retained by Great Britain. The American plenipotentiaries undoubtedly accepted the language of the treaty in that sense and the British plenipotentiaries undoubtedly understood that the Americans accepted it in that sense.

It is not to be supposed that the American negotiators would have accepted the words *in common* without question if it had been thought to introduce a condition not belonging to the former right. Their instructions, their peremptory declarations to the British negotiators accepted by the latter, and never receded from by the American negotiators, and their reports of the result of their labors to the Secretary of State, all negative the possibility of such supine action on their part. Nor is it to be assumed that the words were considered of special importance by the British negotiators for that or for any other purpose, since they had omitted to employ them in their first project. Their desirability suggested itself to the British negotiators, no doubt, when preparing the draft finally agreed on, as a safeguard against any implication of an exclusive right in the United States, and also to prevent the crowding out by American fishermen of the British fishermen, of which Lord Bathurst had complained and which was in effect the practice of an exclusive fishery,^a and they were accepted by the American negotiators as proper for that purpose, and also as desirable from their standpoint, for the further purpose of fixing beyond question the equal measure and quality of right in the fisheries for which they were contending.

The evidence establishes that Great Britain from the commencement of the negotiations, had not contemplated a denial, as to the limited coasts she was willing to concede, of the full and unrestricted fishing right carried by the treaty of 1783. Mr. Bagot's letters to Mr. Monroe tendering a renewal of the American fishing rights, not only mentioned no diminution of the former right, except with respect to extent of coasts, but showed the most earnest desire to meet to the fullest extent the views of the United States Government, of which views he was fully informed.^b

^a U. S. Counter Case, 9; U. S. Case, Appendix, 277-278.

^b U. S. Case, 36-42; Appendix, 290-291; 292-293.

The letters of Mr. Bagot were in the possession of the British negotiators of the treaty of 1818, transmitted to them by Lord Castlereagh for their information and guidance as well as the letters of Mr. Monroe and Mr. Adams, showing the nature of the American pretensions.^a

The British negotiators were immediately put in possession of the American demands concerning the fisheries, by the American plenipotentiaries as shown by their dispatch (No. 3) to Lord Castlereagh.^b

On the 7th of October, 1818, these demands were supplemented by the memorandum of Messrs. Rush and Gallatin, in which it was stated, among other things, that, "Whatever extent of fishing ground may be secured to American fishermen, the American plenipotentiaries are not prepared to accept it on a tenure or on conditions different from those on which the whole has heretofore been held."^c

That these demands had been acceded to by the British plenipotentiaries was admitted by Mr. Robinson in his dispatch to Lord Castlereagh of October 10, 1818, three days after the American memorandum.^d

When to the foregoing is added the fact that neither in the protocols, nor in the correspondence of the plenipotentiaries between themselves or with their Governments, is there any evidence that the words *in common* were introduced for the very far-reaching purpose now claimed for them in the British Case, or that they were introduced for any purpose which the negotiators on either side considered of particular importance, or worthy of note in their reports of the negotiations, the United States submits that it is not possible, consistently with that good faith which must accompany the construction of treaties, to attach to the words in question the meaning now contended for by Great Britain.

Other provisions of the fishery article negative that there was any purpose on the part of Great Britain to retain any power of limiting or restraining the American right of fishing on the treaty coasts by regulations. The right to impose regulative restrictions on American fishing vessels when resorting to the non-treaty coasts, for shelter, repairs, wood and water, was expressly reserved, while no reservation of a similar right was made with reference to vessels resorting to the treaty coasts for the purpose of fishing. *Expressio unius est exclusio*

^a British Case, Appendix, 85.

^b British Case, Appendix, 86.

^c U. S. Case, 60, Appendix, 314.

^d British Case, Appendix, 92.

alterius. This silence when dealing with the treaty coasts is significant also in view of the rule of interpretation that "if he who could and ought to have explained himself clearly and fully has not done it, it is the worse for him: he can not be allowed to introduce subsequent restrictions which he has not expressed." Vattel commenting on this says:

The equity of the rule is glaringly obvious, and its necessity is not less evident. There will be no security in conventions, no stability in grants and concessions, if they may be rendered nugatory by subsequent limitations which ought to have been originally specified in the deed, if they were in the contemplation of the contracting parties.^a

It is submitted that the rule stated by Vattel gains added force where it is found that a single article of a treaty or convention creates two distinct servitudes, and limits only one of them, leaving the other to stand wholly and entirely on the affirmative words of the grant.

Another incident of the negotiations making strongly against the British contention, is furnished by the treatment of the British counter project introducing certain restrictions on American vessels resorting to the treaty coasts in the matter of spreading nets across the mouths of rivers, and in the matter of having on board dutiable goods, wares, and merchandise.

With reference to these proposed restrictions, the American negotiators said in their memorandum that "their instructions did not anticipate that any new terms or restrictions would be annexed, as none were suggested in the proposals made by Mr. Bagot to the American Government. The clauses forbidding the spreading of nets, and making vessels liable to confiscation in case any articles not wanted for carrying on the fishery should be found on board, are of that description, and would expose the fishermen to endless vexations."^b

Thereupon, the British plenipotentiaries withdrew their proposals and acceded to the American suggestion.^c

It would be difficult to present evidence more pertinent and conclusive that the negotiators of the treaty contemplated nothing more than a renewal, as to limited coasts, of the treaty right of 1783, and that they considered any form of restrictions imposed on the renewed right as conflicting with it and therefore as inadmissible. If a pro-

^a Vattel's *Law of Nations*, Book 2, chap. XVII, sec. 264.

^b U. S. Case, Appendix, 314.

^c British Case, Appendix, 92.

posed restriction was inadmissible because of the nature and extent of the right intended to be granted, how can it be maintained that it was intended to reserve to Great Britain the right to impose such restrictions of her own volition?

These considerations would seem to put the matter beyond the realm of doubt, but the demonstration would be incomplete without a glance at the contemporaneous construction of the treaty by the British Government.

CONTEMPORANEOUS CONSTRUCTION.

The first step taken by either Government under the treaty was the passage by the King and Parliament of Great Britain of the act of June 14, 1819. This act by the first section authorizes His Majesty, the King—

to make such regulations, and to give directions, orders and instructions to the governor of Newfoundland or to any other officer or officers on that station, or to any other person or persons whom ever, as shall or may be deemed proper and necessary for the carrying into effect the purposes of the said convention, with relation to the taking, drying and curing of fish, by the inhabitants of the United States of America, in common with British subjects, within the limits set forth in the said articles of the said convention and hereinbefore recited.^a

The second section of the act related to coasts other than the treaty coasts referred to in the first section, and made it unlawful for other than British subjects to fish thereon, or in the bays and harbors thereof, or to be there found preparing to fish.

The third section made it lawful for fishermen of the United States to enter into any of the bays or harbors of the non-treaty coasts for shelter, for repairing damages therein, and for the purchase of wood and obtaining water and for no other purpose—

subject nevertheless to such restrictions as may be necessary to prevent such fishermen of the United States from taking, drying or curing fish in the said bays or harbors or in any other manner whatever abusing the said privileges by the said treaty and this act reserved to them, and as shall for that purpose be imposed by any order or orders to be from time to time made by His Majesty in council under the authority of this act, and by any regulation which shall be issued by the governor or person exercising the office of governor in any such parts of His Majesty's dominions in America, under or in pursuance of any such order in council as aforesaid.

^a U. S. Case, 69.

The fourth and concluding section attached penalties to persons refusing to depart from such bays and harbors (those last mentioned) when ordered by competent authority to do so, and to persons who should refuse or neglect to conform to any regulations made or given for the execution of any of the purposes of the act.^a

The regulations to be made under the first section of the act related to the treaty coasts. Such regulations were to be made by the King alone, by and with the advice of the privy council, and were to be such as were "deemed proper and necessary for the carrying into effect *the purpose of the said convention, with relation to the taking, drying and curing of fish by the inhabitants of the United States, in common with British subjects.*" The regulations here contemplated were such as might be proper and necessary to carry into effect the affirmative purpose of the convention, namely the admission of American fishermen to the liberty of taking, drying and curing fish; and because that purpose was one for the due execution of which the Crown had pledged its faith and concerning which no right of restricted regulation had been reserved by the treaty, the power and duty of making regulations and giving the necessary instructions to effectuate it were lodged in the King alone.

That the regulations to be made by the King were to be confined to the single affirmative purpose stated, is not only to be gathered from the language of the act, but the regulations made by the King with the advice of the privy council, in the order in council made June 19, 1819, were confined to that single affirmative purpose; thus affording a conclusive exposition of the meaning of the act.^b

The regulations on the other hand contemplated by the third section of the act had relation to the non-treaty coasts, and were to be such as might be necessary to prevent the American fishermen who were to be permitted to resort to the bays and harbors of those coasts for shelter, repairs, wood, and water, from taking, drying, or curing fish in such bays, or harbors, or in any other manner abusing the privileges secured to them by the treaty. It will be remembered that the treaty contemplated and provided for this last class of regulations, in the words: "but they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever, abusing the privileges hereby reserved to them."

^a U. S. Case, Appendix, 114.

^b U. S. Case, 71; Appendix, 115.

These restrictions and regulations were to be confined to the restrictive provisions of the treaty, and since they were specially authorized by the treaty and did not involve the affirmative right of the American fishermen, but referred to the non-treaty coasts alone, the power of making them was reposed not alone in the Crown, but was confided as well to the governor or person exercising the office of governor in any part of His Majesty's dominions in America.

The King has had but one occasion since 1819 to recur to the power vested in him alone by the act of 1819. That occasion arose in the year 1907 when the contumacy of the Province of Newfoundland compelled another order in council, securing to American fishermen in spite of adverse provincial laws, the right to enjoy unmolested the fishery in Newfoundland waters accorded to them by the treaty.^a

The United States submits that this legislative and executive action of Great Britain (not departed from for ninety years, and near the end of that time again affirmed by King and council), coming so soon after the execution of the treaty, was a construction by Great Britain of the meaning of the treaty with respect to the making of regulations, which demonstrates that it was not thought at that time that power remained in the British Government to limit by regulations the affirmative right of fishing. If any such power had been thought to remain in the British Government the act of Parliament would have authorized such regulations, and the power of making them would have been reposed cumulatively in the Crown and in the local officials as was done with reference to the regulations to be made on the non-treaty coasts. This contemporaneous construction of the treaty is completely destructive of Great Britain's contention of the present day.

The attempt is made in the British Counter Case to escape from the force of this legislative and executive action of the British Government, by distinguishing between "regulations," and "directions, orders and instructions to the governor of Newfoundland" etc., but the attempt is necessarily unsuccessful. The act of Parliament used the terms *regulations*, and *directions, orders and instructions*, as convertible terms. Both were to be authorized by orders in council, and both were to be directed, not to regulations of the fishery, but to carrying into effect the purposes of the treaty

^a U. S. Case, 74; Appendix, 116.

“with relation to the taking, drying and curing of fish by inhabitants of the United States”. Moreover, if the act had been construed by the King and Council, as requiring and authorizing regulations of the fishery other than regulations for the purpose of assuring the American fishermen in the exercise of their treaty rights, why were not some regulations of that character ever made either by the order in council of June 19, 1819, or by subsequent orders?

The letter of Lord Bathurst of June 21, 1819, transmitting to Sir C. Hamilton, governor of Newfoundland, the act of the British Parliament of June 14, 1819, and the order in council made pursuant thereto contains a further exposition of the meaning of the treaty of 1818.^a

Lord Bathurst in that letter directed the governor to confine American fishermen to fishing “in the same manner as previous to the late war with the United States,” and distinguished between the right to cure and dry fish on the coast of Labrador and on the southern coast of Newfoundland, denominating the latter a “new privilege” and therefore as more limited than the old one on the coast of Labrador. It is quite evident that he considered that all the liberties granted by the treaty of 1818, except the *new privilege* of curing and drying on the southern coast of Newfoundland, partook of the quality of right enjoyed under the treaty of 1783, which it was the object of the treaty of 1818 to renew, and that the measure of the powers and duties of the British Government with reference to the fishery was the same under both treaties.

LATER CONSTRUCTION.

To the foregoing it may be added that for half a century after the conclusion of the treaty of 1818, there were no laws or regulations of Great Britain or any of her colonies which could be regarded as an assertion of, or even an attempt to assert, a right to limit or restrain the exercise by Americans of their treaty rights in the treaty waters. This statement will perhaps be controverted by Great Britain and it would require more space than it is desirable to occupy in this argument to analyze the various ancient laws, star chamber rules, orders in council, regulations, and proclamations, published in the

^a British Case, Appendix, 99.

Appendix to the British Case, for the purpose of sustaining the statement. Nevertheless the United States makes the statement confidently and will amply support it when it comes to present its oral argument.^a More than that no attempt to enforce, as against American fishermen, such laws and regulations as were finally adopted, was made until a much later period, if indeed it can be said that any attempt was ever made to enforce such laws and regulations on the treaty coast against the American fishermen prior to the year 1905.

CONCLUSIONS.

The United States submits:

1. That the treaty of 1818 created in favor of the United States as against Great Britain an international servitude.
2. That the treaty contained no reservation of power in Great Britain to limit or restrain by municipal laws or regulations the beneficial enjoyment of the servitude.
3. That, in the absence of such a reservation, there remains no power in Great Britain to limit or restrain its exercise by the United States, or its inhabitants, without the consent of the United States.

RIGHT TO REGULATE AND CHARACTER OF REGULATIONS.

It is conceived that the foregoing discussion has made it possible to measure intelligently the limiting regulations, mentioned in Question One of the Special Agreement, with the rights granted by the treaty of 1818, and to determine the extent of the conflict between such regulations and the treaty. The first limiting regulation therein mentioned is one "in respect of the hours, days, and seasons when fish may be taken on the coasts." Manifestly the treaty is without limitation as to the hours, days, or seasons when fish may be taken on the treaty coasts, and, therefore, regulations limiting the right to fish to certain hours, days, or seasons are altogether in conflict with the treaty.

^aU. S. Counter Case, 25, 26.

The next regulation mentioned is one in respect of "the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts." Here it is again manifest that the treaty is without limitation as to the method, means, and implements which may be used in the taking of fish or in the carrying on of fishing operations, and that, therefore, regulations limiting the method, means, and implements, which may be used, are in conflict with the treaty. It is not necessary in this connection, to consider regulations in respect of "other matters of a similar character," for the reasons hereinbefore stated.

Here, it is submitted, the affirmative argument logically ends. Regulations of the character, which it is contended Great Britain has authority to make without the consent of the United States, necessarily limit the treaty right granted to the United States; the grant of that right by Great Britain was a voluntary renunciation of her sovereignty to do anything which in fact limits the right; therefore, Great Britain has no authority to make such regulations without the consent of the United States.

BRITISH ARGUMENT AS TO THE RIGHT TO IMPOSE REGULATIONS.

The position of Great Britain in opposition to the views of the United States above set forth is stated thus in the British Case:

As to the general principle which governs the construction of treaties such as this it is submitted that the mere grant of a right or liberty to subjects of one state to do certain acts in the territory of another state, does not itself confer any exemption from the jurisdiction of the state in which those acts are done.^a

This statement is open to criticism in two respects. It speaks of the treaty right in question as the mere grant or liberty to the subjects of one state. The grant it is submitted was to the United States as a nation. Such a grant, the British statement proceeds to assert, does not confer any exemption from the jurisdiction of the state in which the acts are done. If that be true the grant is to be held and enjoyed absolutely at the discretion of the grantor. That position has never been taken by Great Britain heretofore and clearly is not tenable. The very submission in this case negatives any such extreme contention. There must be *some* exemption from the juris-

^a British Case, 40.

diction of the state within which the acts are done. If so, what is it? The United States submits that the exemption is from the exercise of local jurisdiction directed at the particular subject-matter of the grant and intended to limit and restrain its exercise and enjoyment. Further, if the attempted exercise of the local jurisdiction would in fact limit and restrain the enjoyment of the grant, the exemption is not destroyed because some local policy is to be subserved by the limitation and restriction. Necessarily, the exemption remains, where the grant is one of a fishery right to be held in common with the grantor, and the policy which induces any limitation and restriction of the grant is one which the two states have an equal interest in advancing and promoting. This policy can only be advanced and promoted by regulations which, decided upon by the two states, are equally fair and just to each in their provisions.

The British Case^a quotes a passage from Hall's work on international law in support of its view. It was written in connection with a discussion of the construction of treaties, and it is submitted that the author had lost sight temporarily of the distinction between a treaty dealing with a subject-matter not in itself implying a limitation of sovereignty, and a treaty which by reason of the terms and the subject-matter necessarily implies such a limitation. With reference to the first class of treaties it was an accurate statement of the law to say that "no treaty can be taken to restrict by implication the exercise of the right of sovereignty." It was entirely inaccurate to apply that observation to the second class of treaties, because as has been shown, a treaty containing stipulations which have the effect of creating a state servitude, by necessary implication does restrict the right of sovereignty.

In another part of his work Hall speaks of these treaty rights as servitudes, and as derogations "from the full enforcement of sovereignty over parts of the national territory," and this passage will be found to be a more accurate statement of the law applicable here than that quoted from the same author in the British Case.^b

In the passage quoted in the British Case, the contention of the United States put forth in connection with the Fortune Bay claim is characterized as "scarcely intelligible," and it is said that "it was contended that the simple grant to foreign subjects of the right to

^a British Case, 41-42.

^b Hall's *International Law*, pp. 150-160.

enjoy certain national property in common with the subjects of the State carries with it by implication an entire surrender, in so far as the property in question is concerned, of one of the highest rights of sovereignty, the right of legislation." The author was here guilty of another lapse and had lost sight of the fact that the simple grant to foreign subjects of which he speaks was a right of fishery granted by one State to another, and that it was what he had admitted it to be in his servitude discussion, a servitude derogating from the full enforcement of sovereignty over parts of the national territory. His concluding observation that the United States could demand no more "than that American citizens should not be subjected to laws or regulations, either affecting them alone, or enacted for the purpose of putting them at a disadvantage," is so far from correct that one of the most eminent of modern English statesmen in dealing with the very matter, as will be shown in another connection, made no such broad claim, and in the very submission in this Question Great Britain admits that American inhabitants can not be subjected to such laws and regulations unless they are inherently reasonable, necessary, and appropriate, fair, just, and equitable.

Mr. Hall is not a safe author to rely on in cases where his sympathies or prejudices are involved. This is not the view alone of counsel for the United States. Doctor Oppenheim, the learned and impartial English publicist, at present professor of international law at Cambridge University, in the preface to the second volume of his work on international law, refers to the fault of writers who manifest their political sympathies and antipathies, a fault of which he says: "Hall's classical treatise furnishes at once an illustration and a warning."

The treaty provisions, reproduced in the British Case as examples, do not bear upon the position which the United States has taken in this argument. Stipulations for the entry of citizens or subjects of one nation into the territory of another, entitling them to do business there, and to have their property and property rights respected, are mere obligations as distinguished from real rights and do not derogate from sovereignty.

With reference to the first article of the reciprocity treaty of 1854 between the United States and Great Britain, printed in the British Case, the United States takes the position that by that article a

mutual servitude was created, which restricted the sovereignty of each nation, to limit or impair, without the consent of the other, the enjoyment of the servitude reciprocally created.

The statement that American fishermen engaged in fishing under it were uniformly held to be subject to local British regulations, is respectfully denied if the statement implies the acquiescence or participation of the United States in any such holding. The same is true of the statement that it was explicitly recognized in Mr. Marcy's circular that American fishermen were subject to local regulations, if the statement implies that Mr. Marcy recognized that American fishermen were bound to observe regulations limiting their treaty rights except in the sense that such regulations were *de facto* municipal laws, the validity of which, if questioned, it was the right and duty of the nation to dispute and not that of its citizens. The Marcy circular and other acts and declarations of officials of the United States, from which it has been attempted to show concurrence by the United States in Great Britain's claim of a right to make fishery regulations, will be discussed below in another connection.

The last of these treaty provisions printed in the British Case is taken from article 27 of the treaty of 1871, between the United States and Great Britain, called the Treaty of Washington. That article did not provide for the use by citizens of the United States of the Welland, St. Lawrence, and other canals in the Dominion of Canada, as the abbreviated form in which it is printed in the British Case would make it appear, but stipulated merely that Great Britain engaged to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of those canals "on terms of equality with the inhabitants of the Dominion."^a

Even if, however, that article had granted citizens of the United States the rights stated, the principal deduction drawn from it by the British Case might be admitted without impairing the force of any proposition advanced in this argument. It has never, indeed, "been contended that citizens of either country were to be exempt from the local laws of the other country when within its territory." No one has suggested that "on terms of equality" (similar in meaning to the words in common in the treaty under discussion) meant that although the citizens of both countries were subject to law when at home, they were free from law when abroad.

^a British Case, Appendix, 41.

The parenthetical suggestion in the above that the words of the treaty of 1871, *on terms of equality* were similar in meaning to the words *in common* used in the treaty of 1818, is not, however, justified. It is obvious that the equality provided for in the treaty of 1871 was equality of treatment in the use granted. The equality implied by the words "in common" in the treaty of 1818 was equality of right.

It is interesting in view of the present controversy, and it also throws light on the meaning of article 27 of the treaty of 1871, to note the care observed by the two nations in safeguarding national sovereignty when dealing with the rights granted respectively by articles 26 and 28 of the same treaty. These two articles secured to each country the free navigation of certain rivers and lakes within the territories of the other, creating undeniable servitudes in favor of each country as against the other. The right of each country to regulate the enjoyment of the servitude within its borders was not left to any implication of law nor to be drawn from uncertain words, but was specifically reserved. The navigation of the river St. Lawrence was to be "subject to any laws and regulation of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation." The navigation of the rivers Yukon, Porcupine and Stikine (they being partly in both countries) was to be "subject to any laws or regulations of either country within its own territory, not inconsistent with such privilege of free navigation." The navigation of Lake Michigan, that lake being entirely within the United States and bounded by several of the States of the American union, was to be, "subject to any laws or regulations of the United States or of the States bordering thereon, not inconsistent with such privilege of free navigation."^a

BRITISH ARGUMENT BASED ON SUPPOSED CONTINUANCE OF TREATY OF 1783.

An alternative argument is presented in the British Case, based on an assumed contention attributed to the United States, that the treaty of 1783 merely recognized and continued the rights which the fishermen of the United States possessed as subjects of the British Crown before the Declaration of Independence, and that the

^a British Case, Appendix 41.

treaty of 1818 in turn simply recognized and continued preexisting rights.

As a statement of the contention of the United States this is not strictly accurate. The position taken by the United States was that the American Colonies, by reason of their exertions to acquire, maintain, and develop the North Atlantic fisheries, and of the relation of the fisheries to them geographically and economically, were as much entitled to those fisheries upon their separation from Great Britain, as the people inhabiting the territories which remained under the British Crown, and that the treaty of 1783, recognizing the division of the British Empire as the result of the success of the American Revolution, apportioned to each of the divided parts, to be thereafter held by each of them as national possessions, an equal right in those fisheries.

This was very far from a contention that citizens of the United States were merely enjoying the fishery rights which they had formerly enjoyed as subjects of the British Crown, and that their present rights were only a continuation of their former rights. While the right is in essence the same right and grows out of the former right, it was formerly enjoyed by the Americans as British subjects, but it is now enjoyed by them as American citizens. They enjoyed it before by permission of the Crown which owned all the fisheries; they enjoy it now as a national right.

The independence of the United States introduced a factor which resolved the constituent elements of the right on a new basis and metamorphosed what had been municipal rights into international rights. Under the changed condition the right had become one which subjected a part of the territory of Great Britain to the purpose and interest of the United States. In other words, it had become an international servitude limiting the former unlimited power of Great Britain. An appeal, therefore, to the former municipal status to establish the measure of the present international right must be ineffectual for the right being now international is no longer burdened with the municipal incidents which formerly attached to the pre-existing right.

The British Case remarks of the contention in question that "this view has been repudiated by Great Britain," and as the United States, for the purposes of this case, has consented to have its rights measured and adjudicated by the terms of the treaty of 1818, it does not require further consideration.

THE QUESTION OF REASONABLE REGULATIONS.

It is proposed now to examine the special and peculiar form in which Great Britain, with the view, apparently, of escaping the force of the principles of public law applicable to the subject, has stated the British contention in Question One. The British Case does not advance the position that Great Britain is at liberty to make any regulation of the fisheries which may suit the purposes of that Government, but accompanies the contention of an exclusive right to make regulations with the qualification that the regulations must be *reasonable*. Apparently recognizing that this would not strengthen the contention in the light of public law, because a right to make reasonable regulations would be in effect a right to make any kind of regulations, since that Government would be the sole judge of their reasonableness, this contention is limited by the further qualification that the regulations must be reasonable from certain view points.

This Tribunal is thus asked to declare, not that Great Britain has the right to make regulations at will, or to make reasonable regulations, but that Great Britain has the right to make regulations which shall be reasonable judged by certain standards set up by the form of this Question. It is necessary to look at and examine these standards in determining the validity of this contention.

Great Britain contends, as set forth in this Question, for the right without the consent of the United States to make certain regulations if they be reasonable from the view point of their being—,

(a) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said article 1 the inhabitants of the United States have therein in common with British subjects; (b) desirable on grounds of public order and morals; (c) equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter.

It is submitted that the concession, thus made respecting the necessity of the reasonableness of the regulations from the particular view points set up, does not materially change or alter the question of power to be determined by this Tribunal. The concession is indeed an admission that in principle the power to regulate at will and to any extent does not exist in Great Britain, which would determine against Great Britain all the contentions of Question One. Nevertheless, if Great Britain is to be the sole judge of the reasonableness of the

regulations, it is a necessary corollary that, the power once conceded to make regulations *even though coupled with the concession that they must be reasonable*, it is practically and at discretion an absolute and unlimited power.

Every limitation on the fishing right which the British colonies may conceive it to be to their interest to impose, may still be plausibly defended as a reasonable regulation in the interest of the preservation of the fisheries, or as being necessary for the exercise of their common right by the fishermen of the two countries, or as being equitable and fair between them, or as being so framed as not to give the one an unfair advantage over the other. The regulations once made, pursuant to a recognized power to make them, are valid as municipal laws and must be enforced, however unreasonable, unnecessary, and unfair, unless war shall coerce the regulating power, or diplomatic remonstrance convince it of the propriety of changing them.

The power, therefore, to make reasonable regulations according to certain prescribed standards, is not in its practical effect different from the power to make regulations at will and without limitation as to character, when the state which makes the regulations is the sole judge of their reasonableness measured by the prescribed standards. It will be seen that even with the concession made by Great Britain by the peculiar form in which this contention is advanced, the question recurs again and with full force—can a state, which has limited its territorial supremacy by the grant of a servitude to fish in its territorial waters, which grant is without limitation, and without reservation of power either express or implied to regulate the subject-matter of the fishery, make regulations, without the consent of the beneficiary, which limit the enjoyment of the servitude in the very matter of the time and manner of taking fish.

It may be said that it is to be presumed that neither Great Britain nor her colonies will make any regulations which are not reasonable in the sense that they are not necessary, or are unfair and inequitable. But it is submitted that rights, solemnly granted on good consideration, should not be dependent merely upon the presumption of good faith. Such rights are created and defined by solemn writings and are to be held and enjoyed in accordance with the terms of the instrument granting and defining them and to the full extent thereof.

Presumptions of good faith and fair dealing can not be admitted to impair the enjoyment of rights either in international or municipal law. Moreover, there is no such presumption in international law. That law imposes on nations the utmost good faith, but it does not presume it. Presumptions have their foundation in the general observation of mankind that one fact follows another as a reasonable sequence. But the history of nations is far from showing that good faith in its observance always, or even generally, follows the assumption by a nation of international obligations.

An examination of the evidence in this case, it is believed, will show that the colonies, to which Great Britain has largely remitted the performance of her international obligations under the treaty of 1818, have not acted conformably to any such presumption. Under the stimulus of competition with the United States in the fisheries and to hamper and impede the latter, and to favor special localities, they have enacted laws and made regulations limiting the time and manner of fishing which are not necessary to the preservation of the fisheries and which are not fair and equitable as between the fishermen of the two countries. They have also made laws and regulations directed confessedly at the American fishing right, and with a view of making its enjoyment difficult, if not impossible.

The United States calls the attention of the Tribunal in this connection to the Newfoundland Foreign Fishing Vessels Acts of 1905 and 1906,^a and to the diplomatic correspondence conducted by Mr. Root and Sir Edward Grey concerning the same,^b and to various other cognate matters^c for the purpose of showing that this legislation was conceived with the view of depriving American fishermen of their treaty rights in Newfoundland waters, and that it would be effective for that purpose if allowed to be enforced. The United States also calls attention to the Consolidated Statutes of Newfoundland (1892)^d and particularly to sections 1, 4, & 5 of such statutes;^e also to the regulations of the fisheries made by the Governor of Newfoundland in Council, (1905),^f and particularly to sections 19 to 25, both inclusive, and 53 to 62, both inclusive,^g and to pertinent evidence in

^a U. S. Case, Appendix, pp. 197-201.

^b U. S. Case, Appendix, 966, 968, 978, 985.

^c U. S. Case, Appendix, 116; U. S. Counter Case, Appendix, 446-448.

^d U. S. Case, Appendix, 175 et seq.

^e U. S. Case, Appendix, 175-176.

^f U. S. Case, Appendix, 201 et seq.

^g U. S. Case, Appendix, pp. 202, 205-208.

the record concerning the effect of such regulations, for the purpose of showing that these statutes and regulations are intended to and do discriminate in favor of the local shore fishery and against the vessel fishery of the Americans, or were made to suit the convenience of local fishermen and with entire indifference to American fishing rights. Upon the subject of the purpose and effect, of these regulations generally, the United States also calls attention to the diplomatic correspondence between the two countries.^a

The United States further submits that the peculiar form in which Great Britain has clothed her contention is, in view of the subject-matter of the right and the relations of the two nations respecting it, strong confirmation of the contention of the United States that it is entitled to an equal voice in the making of regulations which substantially limit or impair the right, in that the contention contains admissions in the standards of reasonableness set up, which show the identity of interest of the two nations in all the purposes of the regulations and in the manner in which they shall be framed.

They have a common right in the fishery and a common interest in its preservation and protection. They have a like common interest in the full and fair exercise by the fishermen of the two nations of the common right to fish, and in having the regulations to that end so framed as not to give an advantage unfairly to one over the other.

It is true that they have not identical interest in regulations desirable on grounds of public order and morals, but as the relation between public order and morals and regulations directed at the hours, days or seasons when fish may be taken, or at the method, means and implements used in the taking of fish, is far from intimate, and covers, at best, but a limited range of regulations, a discussion of that standard and the regulations which might be referred to it, will be postponed to a later stage of the argument.

There is one particular only, in which the situation of Great Britain with reference to these regulations is different from that of the United States and that is that they are to be enforced within British territorial jurisdiction.

Recurring now to the question of the equal right of the two nations to participate in the making of the regulations, it is not conceived

^a U. S. Case, Appendix, 655-656, 984.

that Great Britain means to contend that her conception of the economic value of the fisheries is above that of the United States, or that she has a superior capacity to conceive of proper and necessary regulations for their preservation, or that she is moved by higher motives of international duty in the desire to secure to the fishermen of both nations a full and equal enjoyment of their fruits. If, therefore, the two nations have an equal right in the fisheries and an equal interest in their preservation and protection, and an equal interest in the imposition of proper and necessary regulations from every view point set up by Great Britain, and since there is no impediment to the making of joint regulations by the two nations, to be enforced by Great Britain alone or by the two nations conjointly as may be agreed on, the United States submits that every principle of public law entitles it to an equal voice in the making of regulations if any are found to be necessary. The contrary view would imply want of equality in discretion and judgment, or in national sovereignty, which it can not be supposed Great Britain means to assert, and which, certainly, it can not be supposed that the United States would admit.

The exclusive right of Great Britain can not be supported on any such indefinite theory as reserved sovereignty. There can be no such a thing as a reserved sovereignty to limit or restrain the exercise of a right the grant of which implies a derogation of sovereignty. Any theory of reserved sovereignty in the granting state which permitted limitations or restraints would, in fact, amount to a derogation of the sovereignty of the state receiving the grant. The latter holds the right granted, if it be a right to do something within the territories of the granting state, such as to participate in the fisheries, by as good right and title as the granting state had to the whole before making the grant. It is held as a national right and by virtue of the sovereignty under which every other national right is held, and is entitled to all the protection which public law gives to any right or property of a nation held by virtue of its sovereignty. These principles it is believed are incontestable, and they must be broken down and swept aside if the United States is to be deprived of an equal voice with Great Britain in the making of regulations which limit and restrain the enjoyment by the former of the joint common and equal right which the two nations possess jointly in the fisheries.

REGULATIONS REFERABLE TO PUBLIC ORDER.

It is admitted that Great Britain has a special and peculiar interest in the preservation of order on the fishing grounds, and so far as British, or colonial laws and regulations designed to that end do not affect the exercise of the American fishing right, the United States would have no occasion to complain of their enforcement. American fishermen, when within the British territory, must not commit crimes nor breaches of the peace, and if they do either they may be punished by British law. It is presumed, however, that regulations referable to public order, within the contention of Great Britain as stated in Question One, mean the establishment of a general method or order of fishing as between the fishermen, such as, for instance, regulations giving priority to the first comer, forbidding the placing or casting of nets and seines over those already cast, providing rules for separating seines and nets which become entangled, and similar regulations. While regulations of this character may have a tendency to preserve order among the fishermen, yet, since they affect the exercise of the fishing right and might be so framed or so administered as to interfere with its fair enjoyment, the United States can not admit the right of Great Britain to make such regulations applicable to American fishermen without the consent of the United States.

Publicists of repute have said that regulations of even this limited character must be made by treaty between the dominant and servient states;^a and it is to be noted that the treaty of 1904 between Great Britain and France, in which the claim of an exclusive right of fishery on the part of France on the Newfoundland coast was renounced, and a right retained for her citizens to fish on a footing of equality with British subjects, conformed to this rule of international law by providing that—

The policing of the fishing on the above-mentioned portion of the coast, and for prevention of illicit liquor traffic and smuggling of spirits, shall form the subject of regulations drawn up in agreement by the two Governments.^b

Regulations which do not actually affect the fishing right in the matter of the time and manner of fishing are conceded to be within the province of British jurisdiction. While such regulations may to some extent impair the faculty of fishing, it is only in the same way and on the same principle, that the arrest and detention of the person

^a Ullmann, sec. 99; Claus, p. 224.

^b U. S. Case, Appendix, 85.

of a fisherman for larceny or for an assault and battery and other like breaches of the local law, impair such faculty. Of this character are laws or regulations against the casting of stones or ballast, the offal of fish and other deleterious matter into the waters of harbors. Since such regulations are chiefly of local concern and do not limit and impair the American fishing right, obedience to them, by American fishermen, may properly be asked by Great Britain.

It should be repeated in this connection that a decision of this Tribunal against the contention of Great Britain does not mean that the fisheries are to go unregulated or unprotected. The United States is as desirous as Great Britain of maintaining the productiveness of the fisheries, in which it has a joint and equal right, and will always be ready, as it has been in the past, to join in making appropriate regulations which are equitable and fair between the fishermen of the two nations, if any are found to be necessary.

REGULATIONS REFERABLE TO PUBLIC MORALS.

With reference to regulations desirable on grounds of public morals, the United States does not controvert the right of Great Britain to make laws in the interest of public morals, but, with one possible exception, there does not seem to be any relation whatever between public morals and regulations governing the hours, days, or seasons when fish may be taken or the method, means, and implements used in the taking of fish. It may be that a prohibition against fishing on Sunday would come within the category of a regulation desirable on the ground of public morals. No other regulation, however, now in force or ever in force on the treaty coasts, relating to the time or manner of fishing, has any relation to public morals, and it is difficult to imagine any other possible regulation of that character which could have such relation. It may fairly be assumed then, that in so far as the British contention in this Question predicates any regulations on public morals, the regulations contemplated were those prohibiting fishing in territorial waters on Sunday.

Sunday observance, it may be admitted, is an important matter, but the civilized countries of the world hold widely divergent views concerning the proper regulation thereof, and it seems rather a strained application of any principle on which Sunday laws are founded, to direct them against fishing in the maritime belt. There

are many matters of national policy which a state may desire to advance or promote, and the United States does not admit that there is any principle of public law which gives Great Britain authority, at the expense of American fishing rights, to conserve and advance the British policy of Sabbath observance any more than any other policy which may commend itself to that Government. If the law is directed at the time and manner of taking fish, and does in fact limit and restrain the treaty right of American fishermen to take fish, it contravenes the treaty right, and the propriety of the policy, which it is supposed to subserve, is wholly immaterial.

Great Britain may some time consider it desirable that British national holidays be observed on the sea by cessation from labor and that the holy days of the Established Church of England be respected. Humane instincts may be aroused to the point of inducing the British Government to make laws against methods of fishing which inflict pain, and necessity may induce Great Britain at some time, as sovereign of the territory over which the fisheries are being carried on, to impose a license tax on the liberty to fish, or an excise tax on each individual's catch of fish. If Great Britain may say that those entitled by treaty to an unlimited right to fish in British waters must refrain from fishing one day out of every seven, in aid of the British religious policy, that Government may go so far as to claim an equal right to proscribe other days, and to impose any other limitations on the fishing right which commend themselves in aid of these or of any other policies connected or unconnected with the regulation of the fisheries.

Apart from the question of the power to impose British Sunday laws on American fishermen, which alone has been discussed up to this point, there still remains to be considered the reasonableness of such laws, either within themselves, or within the standard set up by Great Britain; viz., "desirable on grounds of public morals."

It may be said of such laws that they are not reasonable in any sense when directed against foreigners having treaty rights to fish in the territorial waters, because they do not operate as a regulation of fishing, but a prohibition against fishing.

Furthermore, Sunday laws are not reasonable in any sense when applied to foreigners whose vessels must come, as in this case, a distance of three hundred leagues, for the purpose of enjoying their treaty rights. Where fishing vessels can make at most two and

usually only one voyage during the season, it is unreasonable to limit in any way the number of days in which they may engage in fishing.

Such laws are not reasonable from any standpoint, in view of the peculiar nature of the fishing pursuit. Mackerel and herring and other sea fishes which move in schools and visit the shores at certain seasons only are elusive, appear at one place to-day and at another to-morrow and the next day may have disappeared. They must be taken whenever and wherever opportunity offers if they are to be taken at all.

It is submitted further that prohibitions against sea-fishing on Sunday is not reasonable in the sense that it is desirable on grounds of public morals. Those whose pursuits are on the great deep may well be said to be engaged in works of necessity and not to be included in the divine command against labor on the Sabbath day. Such is the manner of looking on the efforts of men engaged in other branches of maritime life, and equal indulgence is due the brave and hardy men who pursue their calling on the seas in the frail crafts of the fishermen. It is believed that fishermen engaged in vessel-fisheries the world over fish on Sunday and that laws against such fishing are unknown in most Christian countries. Moreover, Sunday laws are not based on the idea of enforcing the religious command, but on the policy of not permitting in public open and flagrant disregard of the religious sense of the people. It can hardly be pretended that the people on shore can be seriously shocked in their religious sensibilities by the Sunday fishing of American vessels on the treaty coasts.

Finally, it is to be observed that the laws adopted by Newfoundland prohibiting Sunday fishing are not based on any principle of conserving public morals. The only kind of fishing on Sunday which is prohibited is the taking of herring with seines,^a and the inhabitants are at liberty to engage as fully as they may think proper in the taking of all other kinds of fish. This prohibition clearly has nothing to do with public morals and evidently is based upon some policy of local convenience with which the United States has no concern except that it applies to the kind of fishing in which the American fishermen are chiefly interested.

^a U. S. Case, Appendix, 202.

**LEGISLATIVE AND ADMINISTRATIVE ACTION AND DIPLOMATIC
CORRESPONDENCE SINCE 1818.**

It is now proposed to consider briefly the significance of certain statutes, and administrative acts on the part of the two Governments, and the interchange of views between their diplomatic representatives, extending from 1818 down to the present time, which are referred to in the Cases and Counter Cases of the United States and Great Britain.

**THE BRITISH ACT OF JUNE 14, 1819, AND THE ORDER IN COUNCIL
OF JUNE 19, 1819.**

The force of these formal acts of Great Britain, taken immediately after the treaty of 1818 was made, constituting a contemporaneous construction of the treaty by that Government contrary to the meaning for which it now contends, has already been pointed out, and it has been shown that Great Britain did not attempt to depart from the construction thus given the treaty until recent years. Further discussion of this subject would seem to be unnecessary.

**NEWFOUNDLAND'S LEGISLATIVE ACCEPTANCE OF THE TREATY
OF 1871.**

The fisheries articles of treaty of 1871 were extended to Newfoundland by Article 32 of that treaty, with the proviso that if the Imperial Parliament, the Legislature of Newfoundland, or the Congress of the United States should not embrace the Colony of Newfoundland in their laws enacted for the purpose of carrying the treaty into effect, then that the fisheries provisions of the treaty should not extend to Newfoundland.^a

The Congress of the United States, by section 2 of the Act of March 1, 1873, provided, pursuant to the treaty, that whenever the Newfoundland Government should give its consent to the application to Newfoundland of the stipulations and provisions of Articles 18 to 25 of the treaty, inclusive, and allow the United States the full benefits of all the stipulations therein contained, then that colony should be entitled to avail itself of the stipulations of the treaty.^b

^a U. S. Case, Appendix, 32.

^b U. S. Counter Case, Appendix, 60.

The Legislature of Newfoundland, by an act of May 5, 1873, undertook to give its consent to the treaty and to admit the United States to the full benefit of the fishing privileges of the treaty, but in suspending in favor of the United States all laws in conflict with the treaty, a proviso was added "that such laws, rules, and regulations, relating to the time and manner of prosecuting the fisheries on the coasts of this island, shall not be in any way affected by such suspension."^a

This act of the Newfoundland Legislature was brought to the attention of Mr. Fish, then Secretary of State, and he was asked by the British minister, Sir Edward Thornton, to advise the President to issue a proclamation that Newfoundland had complied with the treaty requirements and was entitled to the benefit of its provisions.^b

Mr. Fish, in a reply dated June 25, 1873, referred to the proviso in the Newfoundland act, stating that from the note of the British minister it would appear that the proviso contemplated a restriction in point of time of the herring fishery, and declared that the treaty placed no limitation of time upon the right of taking fish, and therefore that the Newfoundland act did not appear to be such consent to the application of the treaty to Newfoundland as was contemplated by the act of Congress. He declined, accordingly, to advise the President to issue the proclamation.^c

The British Government, through its diplomatic representative at Washington and the colonial authorities of Newfoundland, struggled unsuccessfully against the position taken by Mr. Fish, and finally, recognizing the force of his objection and yielding to it, Newfoundland, on March 28, 1874, amended the act by eliminating the objectionable proviso.^d

THE MARCY CIRCULAR.

On June 16, 1855, the lieutenant-governor of New Brunswick sent to Mr. Crampton, British minister at Washington, a copy of the laws and regulations of New Brunswick governing the fisheries in that Province, for the purpose of having the latter submit them to the Government of the United States with the view of securing their approval by that Government and bringing them to the atten-

^a U. S. Counter Case, 34; Appendix, 87.

^b U. S. Counter Case, Appendix, 195, 196.

^c U. S. Counter Case, 33; Appendix, 196-197.

^d U. S. Counter Case, 34; Appendix, 87.

tion of American fishermen, then lately admitted to fish in New Brunswick waters by the treaty of 1854.^a

As a result Mr. Crampton subsequently had an interview with Mr. Marcy, Secretary of State of the United States, and on July 12, 1855, Mr. Marcy prepared and sent to the collector of customs of Boston a circular on the subject.^b

The British Government raised some objection to a clause in the circular, and the correspondence, which followed, between Mr. Marcy and Mr. Crampton and the positions taken by the two Governments are fully discussed in the Counter Case of the United States.^c

In the communication from Mr. Crampton to Mr. Marcy concerning the draft of the circular sent to him for comment, Mr. Crampton suggested, as a substitute for the clause objected to, the following: "American citizens would, indeed, within British jurisdiction, be equally liable with British subjects to the penalties prescribed by law for a willful infraction of such regulations."^d

Mr. Marcy declined to accept the language suggested, but inserted instead the following clause:

By granting the mutual use of the inshore fisheries neither party has yielded its right to civil jurisdiction a marine league along its coast. Its laws are as obligatory upon the citizens or subjects of the other as upon its own. The laws of the British provinces not in conflict with the provisions of the reciprocity treaty would be as binding upon citizens of the United States within that jurisdiction as upon British subjects. Should they be so framed or executed as to make any discrimination in favor of the British fishermen, or to impair the rights secured to American fishermen by that treaty, those injuriously affected by them will appeal to this Government for redress.

Mr. Marcy was here considering, first, the obligatory force of the laws of the two nations generally, and, second, their obligatory force when taken in connection with the reciprocity treaty. As to the first he recognized the full jurisdiction of each nation over its territory; but, as to the second, he conceded the binding force of the laws only when "not in conflict with the reciprocity treaty;" as will be seen when the entire circular is read, he enjoined on fishermen of the United States obedience to the local laws and an appeal to their Government if such laws were so framed or enforced as to injuriously affect their rights. The direction to obey the local laws without

^a U. S. Counter Case, 29; British Case, Appendix, 205.

^b British Case, Appendix, 207.

^c U. S. Counter Case, 29-32.

^d British Case, Appendix, 210-211.

reference to their character was in the interest of comity and good order.

That Mr. Marcy was speaking of the obligatory effect within the British jurisdiction of the British laws regulating the fisheries in a *de facto* sense is evident. That view had been suggested to him by Mr. Crampton, and Mr. Marcy's purpose was to prevent a collision between the fishermen and the authorities, which might have resulted from a refusal of the American fishermen to observe the local laws, which Mr. Crampton had stated the provincial magistrates would have no choice but to enforce.

The United States contends that all that this correspondence shows is that Great Britain submitted certain existing colonial laws and regulations to the Secretary of State of the United States and secured the approval of the latter and his direction to American fishermen to observe such laws and regulations. Mr. Marcy approved them provisionally as reasonable and desirable, but reserved the right to the United States to pass on them if in their practical application they should prove to be "so framed or executed as to make any discrimination in favor of the British fishermen, or to impair the rights secured to American fishermen by that treaty."

Read in the light of these facts, it is submitted that there is nothing in the Marcy circular which conflicts with the position now assumed by the United States.

THE BOUTWELL CIRCULAR.

On June 9, 1870, Mr. Boutwell, Secretary of the Treasury of the United States (not Secretary of State, as erroneously stated in the British Case),^a issued a circular informing American fishermen of the status of their fishing rights on the non-treaty coasts under the treaty of 1818. In that circular Mr. Boutwell made the statement that "fishermen of the United States are bound to respect the British laws and regulations for the regulation and preservation of the fisheries to the same extent to which they are applicable to British or Canadian fishermen."^b

It is shown in the Counter Case of the United States^c that this circular related only to the Canadian non-treaty coasts, on which the

^a British Case, 13.

^b British Case, Appendix, 237-249.

^c U. S. Counter Case, 37-39.

license system for foreign fishing vessels had been lately discontinued by the Canadian government. There was no controversy at that time of any kind about American rights on the treaty coasts, and it was necessary for the British Case to detach from its context the statement of Mr. Boutwell in order to give it an unwarranted application to the treaty coasts.

THE HALIFAX ARBITRATION AND AWARD.

Under the treaty of 1871, which in its grant of fishing rights is in effect the same as with that of 1818; that is to say, the right was to inhabitants of the United States in common with British subjects, the question whether the fishing rights of Americans in the British in-shore waters exceeded in value those of the British in American inshore waters plus the commercial rights conceded to Great Britain by the treaty, and, if so, to what extent, was submitted to the Halifax tribunal consisting of one arbitrator from each nation and a neutral umpire. The proceeding was an international arbitration and each nation submitted its case in due and regular form and followed that submission with written and oral arguments. The British case claimed an award against the United States of \$2,880,000 for the new fishing privileges on the coasts of Newfoundland, and of \$12,000,000 for those on the other coasts of British North America, or a grand total of \$14,880,000.^a

The Tribunal awarded against the United States the payment of the gross sum of \$5,500,000.^b

An examination of the case presented by Great Britain at Halifax in support of its demand will show:

First. That Great Britain then assumed, for the purposes of the enormous award which it claimed against the United States and which it received, although not to the full extent claimed, that the grant of a fishing right to inhabitants of the United States "in common" with British subjects was not the restricted right now claimed to be implied by those words, but that the grant ceded and conveyed the entire freedom of the fisheries in their natural extent.

Second. That this entire freedom extended to the point of depleting and possibly destroying, the inshore fisheries through the unlimited exercise of such right in any and all seasons of the year, and

^a U. S. Counter Case, Appendix, 555.

^b U. S. Case, Appendix, 1115.

with any means and implements which the American fishermen might see fit to employ.

Not only was there no suggestion of any control by Great Britain which might limit the enjoyment of the right and thereby diminish the damages, which Great Britain was demanding from the United States, but on the contrary the British case is filled with suggestions negating any such control by future legislation.

More than that, it would have been impossible for Great Britain to have presented any evidence of the value of a fishery, the extent of which was dependent on laws to be made by her from time to time limiting the enjoyment of the fishery. Accordingly there is found throughout the British case submitted at Halifax the broadest statements of the complete freedom from restraint of the fishery granted to the United States, and of the right of the United States to fish without limitations as to time or the instrumentalities to be employed. It was even suggested that fishing might be carried on to the extent of depleting and destroying the inshore fisheries.^a

The treaty of 1871, in its words descriptive of the nature of the right granted, is in effect the same as that of 1818. The right is described in the treaty of 1871 as "in addition to the liberty secured" by the treaty of 1818. Lord Salisbury, in his letter of April 3, 1880, described the rights granted by the treaty of 1871 as "superadded" to those of the treaty of 1818.^b

The United States submits, therefore, that the contention of Great Britain upon which the Halifax award was made was more than a mere action taken on a cognate subject, to be applied by analogy to the present controversy as to the true meaning of corresponding provisions in the treaty of 1818. It was an action on the identical subject-matter now being litigated, and such as would be binding and conclusive between individuals under the municipal law of the two countries, and, it is believed, under the municipal law of every country. It was also an action which, without reference to the binding effect of the award would constitute an equitable estoppel in the municipal courts of the United States and Great Britain, where parties are not permitted to take inconsistent positions when it would be inequitable for them to do so.

Assuming that an international tribunal engaged in applying the principles of international law will be not less insistent than the

^a U. S. Counter Case, Appendix, 532, 535, 538, 542, 547, 550, 552, 562.

^b U. S. Case, Appendix, 684.

municipal courts in enforcing good faith, it is submitted that Great Britain can not now be permitted to assert a construction of the treaty of 1818 contrary to the construction which, before the Halifax Tribunal, that Government placed on the identical language when used in the treaty of 1871, and upon which construction it claimed against the United States an award of \$14,880,000 and received an award of \$5,500,000.

The right of the United States was then treated as unlimited in extent and might have been exercised to the entire destruction of the inshore fisheries. It is now treated as such a limited right as Great Britain, in the interest of the preservation of the fisheries, may see fit to permit.

According to the discussion at Halifax, it might be exercised in winter or summer and no exception was made of the Sabbath day. Now the preservation of the fisheries is said to require closed seasons, and many restrictions on fishing at all seasons, and British morals require that the fishing right be not exercised on Sunday.

Likewise in the Halifax discussions purse seines were not regarded as destructive and the sum of the award was largely increased because American fishermen were known to have taken as high as 3,000 barrels of herring at a single haul with these improved appliances. Fishing with trawls, (bultows) was another method of fishing which, then was regarded as legitimate, but has since become illegitimate and subject to British prohibition.

The United States is far from suggesting that the positions taken at Halifax by Great Britain were without foundation and for the purpose of improperly swelling the award in that case. On the contrary it insists that the positions then taken by that Government as to the nature and extent of the American fishing right were absolutely sound, and that, whether Great Britain is willing or unwilling at the present moment, justice and good faith will compel that Government to abide by the incontestibly sound positions then taken.

THE CARDWELL LETTER.

Mr. Cardwell, British colonial secretary, in a letter to the Lords of the Admiralty (April 12, 1866), made the following observation in connection with instructions to naval vessels, patrolling the treaty coasts:

Americans who exercise their right of fishing in colonial waters in common with subjects of Her Majesty, are also bound, in common with those subjects, to obey the laws of the country, including such colonial laws as have been passed to insure the peaceable and profitable enjoyment of the fisheries by all persons entitled thereto.^a

This letter was, it appears, communicated to Mr. Fish, Secretary of State, on June 3, 1870, more than four years after it had been written, and that the latter took no exception to the declaration of Mr. Cardwell is alleged and commented on in the British Case.^b It will be found, however, that Mr. Fish, in his answer to the note of Mr. Thornton communicating the Cardwell letter, called his attention to later instructions of the Lords of the Admiralty, and guarded against acceptance of the views of Mr. Cardwell by saying, "*and without entering into any consideration of questions which might be suggested by the letter referred to, which I understand to be superseded by later instructions, I think it best to call your attention to the inconsistencies referred to in order to guard against misunderstandings and complications that might arise in the absence of modification of the instructions communicated in your note of the 3d inst.*"^c

THE FORTUNE BAY CONTROVERSY.

This controversy arose out of the action of Newfoundland fishermen at Fortune Bay on Sunday, January 6, 1878, the facts of which are set forth in the Case of the United States.^d The incident was brought to the attention of the British Government, and Lord Salisbury, secretary of state for foreign affairs, having caused the facts to be investigated addressed a letter to the American minister (August 23, 1878) enclosing a report of Captain Sullivan on the subject, and dismissed the matter with the statement that the American fishermen when interfered with had been guilty of three separate infractions of the laws of Newfoundland regulating the fisheries, namely, taking herring with a seine, fishing between the 20th day of October and the 25th day of April, and fishing on Sunday.^e

Mr. Evarts, the American Secretary of State, in a letter to Mr. Welch, the American minister, dated Sept. 28, 1878, objected to the

^a British Case, Appendix, 221.

^b British Case, 30.

^c U. S. Counter Case, 36; British Case, Appendix, 237.

^d U. S. Case, 162-176.

^e U. S. Case, Appendix, 650-651.

implication that American fishermen were to be subjected to local laws limiting the time and manner of fishing, and in view, apparently, of the near approach of the time for the payment of the Halifax award, added:

In the opinion of this Government, it is essential that we should at once invite the attention of Lord Salisbury to the question of provincial control over the fishermen of the United States in their prosecution of the privilege secured to them by the treaty. So grave a question, in its bearing upon the obligations of this Government under the treaty, makes it necessary that the President should ask from Her Majesty's Government a frank avowal or disavowal of the paramount authority of provincial legislation to regulate the enjoyment by our people of the inshore fishery, which seems to be intimated, if not asserted, in Lord Salisbury's note.

Before the receipt of a reply from Her Majesty's Government, it would be premature to consider what should be the course of this Government should this limitation upon the treaty privileges of the United States be insisted upon by the British Government as their construction of the treaty.^a

Lord Salisbury, in reply, wrote on November 7, 1878, to Mr. Welch as follows:

Apart, however, from the facts in respect to which there appears to be a material divergence between the evidence collected by the United States Government and that collected by the colonial authorities, Mr. Evarts takes exception to my letter of the 23d, on the ground of my statement that the United States fishermen concerned have been guilty of breaches of the law. From this he infers an opinion on my part that it is competent for a British authority to pass laws, in supersession of the treaty, binding American fishermen within the three mile limit. In pointing out that the American fishermen had broken the law within the territorial limits of Her Majesty's dominions, I had no intention of inferentially laying down any principles of international law; and no advantage would, I think, be gained by doing so to a greater extent than the facts in question absolutely require.

I hardly believe, however, that Mr. Evarts would in discussion adhere to the broad doctrine which some portion of his language would appear to convey, that no British authority has a right to pass any kind of laws binding Americans who are fishing in British waters; for if that contention be just, the same disability applies *a fortiori* to any other power, and the waters must be delivered over to anarchy. On the other hand, Her Majesty's Government will readily admit—what is, indeed, self-evident—that British sovereignty as regards these waters, is limited in its scope by the engagements of the treaty of Washington, which cannot be modified or affected by any municipal legislation. I cannot anticipate that with regard to these principles any difference will be found to exist between the views of the two Governments.^b

^a British Case, Appendix, 655, 656, 657.

^b U. S. Case, Appendix, 657, 658.

In reply Mr. Evarts, on August 1, 1879, again took up matter of local regulations limiting the American fishermen in the time and manner of fishing, and placed the American contention on absolutely impregnable grounds.^a

Lord Salisbury did not controvert the main propositions of Mr. Evarts's letter, but on August 30, 1880, responding to a formal claim for damages made by the United States in the interim, declined to allow the claim and assigned as the sole ground for his action, that the American fishermen when violently interrupted were using the strand in their fishing operations contrary to the provisions of the treaty, which reason need not be noticed here because not involving any question of regulations, and, further, that they were inbarring herrings contrary to the local law, which he claimed was in force at the time the treaty of 1871 was entered into, and was thereby distinguished from the other breaches of the local laws mentioned by him in his first letter. On the last point he said:

In my note to Mr. Welch, of the 7th of November, 1878, I stated "that British sovereignty, as regards these waters, is limited in its scope by the engagements of the treaty of Washington, which cannot be modified or affected by any municipal legislation," and Her Majesty's Government fully admit that United States fishermen have the right of participation on the Newfoundland inshore fisheries in common with British subjects, as specified in Article XVIII of the treaty. But it cannot be claimed, consistently with this right of participation in common with the British fishermen, that the United States fishermen have any other, and still less that they have greater rights than the British fishermen had at the date of the treaty.

If, then, at the date of the signature of the treaty of Washington, certain restraints were, by the municipal law, imposed upon the British fishermen, the United States fishermen were, by the express terms of the treaty, equally subjected to those restraints, and the obligation to observe in common with the British the then existing local laws and regulations, which is implied by the words "in common" attached to the United States citizens as soon as they claimed the benefit of the treaty.^b

This correspondence is important on account of the vigorous and convincing manner in which Mr. Evarts maintained that American fishermen, under the treaty of 1871, were exempt from limitations on their fishery imposed by imperial or colonial laws or regulations, and also on account of Lord Salisbury's concessions, which were—

First. That British sovereignty over the inshore fisheries was limited in its scope by the stipulations of the Treaty of Washington, which could not be modified or affected by any local legislation.

^a U. S. Case, Appendix, 661 et seq.

^b U. S. Case, Appendix, 685.

Second. That the only laws or regulations, which the use of the words "in common" in the treaty implied as binding on American fishermen, were those which were in existence at the date of the treaty.

Either one of the concessions made by Lord Salisbury, it is submitted, is sufficient to sustain the position of the United States in this case. Without admitting the distinction made by him in favor of laws and regulations in force at the date of the treaty, nevertheless, under that distinction, American fishermen would be exempt from limiting regulations of all kinds, because there are no such regulations now in force which were in force at the date of the treaty of 1818.

SETTLEMENT OF FORTUNE BAY CLAIMS.

This correspondence did not close the Fortune Bay incident. Earl Granville, who had succeeded Lord Salisbury, took up the matter in a note of October 27, 1880, to Mr. Lowell, the American minister at London. After reviewing the controversy he made the following suggestion concerning the American claim for damages:

As regards the claim of the United States fishermen to compensation for the injuries and losses which they are alleged to have sustained in consequence of the violent obstruction which they encountered from British fishermen at Fortune Bay on the occasion referred to, I have to state that Her Majesty's Government are quite willing that they should be indemnified for any injuries and losses which, upon a joint inquiry, may be found to have been sustained by them, and in respect of which they are reasonably entitled to compensation; but on this point I have to observe that a claim is put forward by them for the loss of fish which had been caught, or which, but for the interference of the British fishermen, might have been caught by means of strand fishing, a mode of fishing to which, under the treaty of Washington, they were not entitled to resort.^a

This suggestion led to the eventual offer by the English Government of the sum of £15,000 in full satisfaction of the claim. The offer was accepted and the incident thus closed.^b

BRITISH SUGGESTION FOR JOINT REGULATIONS.

In this later correspondence it is important to note that Earl Granville, in his letter of October 27, made a suggestion that the two Governments make joint regulations governing the common fishery, and thereby avoid further difficulties.^c

^a U. S. Case, 176; Appendix, 743.

^b U. S. Case, Appendix, 735, 736, 737.

^c U. S. Case, 177; Appendix, 713.

This suggestion not being immediately responded to, Lord Granville in a letter of February 24, 1881, to Sir Edward Thornton, renewed the suggestion.^a

In his interview with Mr. Lowell, at a later period, Earl Granville reverted to this suggestion and asked Mr. Lowell to inquire whether it would be acceptable, to which Mr. Blaine, then Secretary of State, replied by cablegram, March 14, 1881, that—

The subject of joint cruisers may be postponed, or, if desired, may also be referred to Sir Edward and myself to be taken up afterwards with power to agree upon a series of regulations under which treaty rights may be mutually secured.^b

On the day of Mr. Blaine's cablegram, Sir Edward Thornton wrote Earl Granville:

Upon my inquiring what steps it was proposed to take with a view to an agreement as to the rules and regulations which are to prevail hereafter respecting the fisheries, Mr. Blaine replied that this question would meet the early consideration of the United States Government, and that he thought it was very desirable that a decision should be arrived at as soon as possible.^c

No further correspondence on the subject immediately ensued, but on May 3, 1882, the British legation at Washington left with the Department of State a memorandum of the laws of Newfoundland regulating the fisheries, containing the statement that, when an agreement had been arrived at as to regulations governing the fisheries, Newfoundland would be invited to make any changes in her laws found to be necessary.^d

In reply to this the Department of State submitted a memorandum pointing out a number of provisions in the laws referred to, which were considered objectionable and as limiting the American fishery right, and concluding with the suggestion that the same be dispensed with or declared not applicable to the United States by virtue of its treaty rights.^e

Earl Granville in a letter to Sir L. S. West of July 15, 1882, failed to recognize in the memorandum of the United States a favorable response to the British memorandum or to the repeated suggestions of his own that the two Governments should unite in the making of joint regulations and thus avoid further controversy, and dismissed the matter with regret.^f

^a U. S. Case, Appendix, 726.

^b U. S. Case, 178; Appendix, 730, 731.

^c U. S. Case, Appendix, 732.

^d U. S. Case, 179; Appendix, 742-743.

^e U. S. Case, 180; Appendix, 745.

^f U. S. Case, Appendix, 747.

It is evident from this correspondence, that at that time the United States was invited to assist in making the regulations, and likewise to join in their enforcement in British waters.

JOINT ACTION OF GREAT BRITAIN AND FRANCE.

It is deemed proper in this connection without going into the matter at length, to call attention to several conventions between Great Britain and France relating to the regulation of the Newfoundland fisheries on the French treaty coast.

By the treaty of 1857, which failed to secure the sanction of the legislature of Newfoundland, provision was made for joint commissioners to adjust differences arising under the treaty, and these commissioners were given power, subject to the approval of the two Governments, to frame "regulations for the exercise of concurrent rights by the parties to this convention with a view to prevent collisions."^a

Under the arrangements of 26th April, 1884, and of 14th November, 1885, which were also dissented from and defeated by the government of Newfoundland for reasons not involved in this case, it was provided that the superintendence and the police of the fisheries should be exercised by the ships of war of the two countries, which were to notify to each other mutually any infractions of the treaty and to record all such infractions; to oppose operations of the British subjects which might interrupt the French fishermen; to draw up reports of interferences on shore which disturbed the drying and preparing of fish, such reports being made competent evidence in judicial proceedings; to secure the persons of offenders and their boats, to be given up to the local authorities and dealt with by them; and to administer immediate justice within the limits of their powers, with regard to complaints brought to their notice. Resistance to their directions or injunctions was made resistance to competent authority.^b

By the treaty of 1904 France renounced the fishery rights established by the treaty of Utrecht and confirmed by subsequent treaties, but retained for her citizens the right of fishing on a footing of equality with British subjects in the waters of Newfoundland from Cape St. John to Cape Ray. France thus renounced the right to dry and cure fish on land, and also the claim of an exclusive right

^a U. S. Case, Appendix, 58; U. S. Counter Case, 23.

^b U. S. Case, Appendix, 69; U. S. Counter Case, 23.

to fish which she had ineffectually asserted for over a century, retaining the right to fish on the prescribed coasts on a footing of equality with British subjects. French rights of fishing under this new treaty are not as great as the American rights under the treaty of 1818, either in the extent of coasts or in the essential nature of the rights. Yet the two Governments agreed by that treaty that the policing of the fishing and the prevention of illicit liquor traffic and smuggling of spirits, should form the subject of regulations drawn up in agreement by the two Governments.^a

All these treaties show the entire practicability of regulations to be made by the joint action of the two Governments, as well as of their joint administration and enforcement within British territory. While the regulations mentioned in the treaty of 1904 for the policing of the fishing, appear to have been such only as might be necessary to secure the fair participation of the French in the fisheries and to preserve order among the fishermen, the admission of France to participation in the making and administration of such regulations was certainly as much in derogation of British sovereignty as any contention advanced by the United States in this case.

The treaty of 1904 is noticeable also in the fact that it expressly reserves to Great Britain the power to establish closed seasons and to make regulations for the improvement of the fisheries, a reservation not made in the treaty of 1818.

BRITISH ADMISSION OF DOMINANT FRENCH RIGHTS.

It is impossible to examine the conduct by Great Britain of the fishing controversy with France without being convinced that the former fully recognized that the French treaty right in Newfoundland waters was a real right as distinguished from a mere obligation, and that it constituted an international servitude which limited the territorial sovereignty of Great Britain. The large measure of authority to be exercised by France in British waters conferred by the treaties above mentioned prove this fact. The declarations of British statesmen from time to time prove it. It is shown by the declaration of the Earl of Derby to the governor of Newfoundland, contained in his letter of June 12, 1884, that,

“the peculiar fisheries rights granted by treaties to the French in Newfoundland invest those waters during the months of the year

^a U. S. Case, Appendix, 83.

when fishing is carried on in them both by English and French fishermen with a character somewhat analogous to that of a common sea for the purpose of the fishery."^a

It is shown by Lord Salisbury's reference to the French fishery right in Newfoundland, in his speech in the House of Lords on March 19, 1891, when he said:

Judging from some utterances that I have seen of—I am sorry to say—responsible parties, they seem to imagine that the embarrassments with which they are struggling are brought on as a result of their loyalty to the Queen and of their connection with this country. That is a great mistake. I do not for a moment think that there is the slightest probability or chance of the realization of those utterances by which their political position would be modified; but I only say that it is a great mistake to imagine that this difficulty with France would be in the slightest degree affected if they were now at liberty to tender their allegiance to any other sovereignty or state in the world. The rights of the French would attach to that part of the coast under whatever allegiance they might be.^b

FRENCH ASSERTION OF DOMINANT RIGHTS.

The aggressive assertion of her rights by France whenever they were disturbed in any manner by Newfoundland and the ready yielding to these assertions by the statesmen of Great Britain also show the consciousness of Great Britain of the strength of the French right as constituting an international servitude.

On December 13, 1858, Lord Cowley, British minister to France, wrote to Count Walewski, the French minister for foreign affairs, that the report had reached the British ministry that the commander-in-chief of the French naval forces in Newfoundland waters had formally notified him that from the commencement of the ensuing season the French cruisers would "vigorously enforce as against British subjects the rights secured to France by existing treaties," and added that the Imperial Government would not be surprised if her Majesty's Government gave on their part "a counter notice that, from the same date, French subjects will be required strictly to conform themselves to the terms of the treaties between the two countries."^c

This was a declaration by the French Government of its purpose to invade with its naval forces the territorial jurisdiction of Great Britain and to there employ those forces against British subjects for the protection of the French fishermen, and the only response of

^a U. S. Counter Case, Appendix, 30.

^b Hansard's Parliamentary Debates, 3d ser., Vol. CCCLI, p. 1413.

^c U. S. Counter Case, Appendix, 257.

Great Britain was that, if France chose this extreme method of maintaining her rights, Great Britain would employ similar methods against any infraction of the treaty by French subjects and would require them strictly to conform themselves to the terms of the treaty.

The British Government again evidenced its consciousness of the nature of the French right, when, on June 12, 1884, the Earl of Derby wrote to the governor of Newfoundland urging the acceptance of the arrangement then lately concluded with France, giving France extensive rights of interference in the waters of Newfoundland in the protection of her fisheries, and said:

In return for the advantages to the colony above enumerated, Her Majesty's Government would, under the present arrangement, recognize little more than the *de facto* state of things existing as regards the acts of authority exercised every fishing season by the French cruisers in the waters over which the French treaty rights extend, and the exercise of these acts on the part of French cruisers would only take place in cases of infraction of the very reasonable provisions of this arrangement, and then only in the absence of any of Her Majesty's cruisers.^a

On September 20, 1886, Count d'Aubigny wrote to the Earl of Idlesleigh in the following peremptory terms:

MY LORD: A decree of the Newfoundland government, dated the 9th August last, has prohibited lobster fishing for three years, from the 30th September next, in Rocky Harbour (Bonne Bay, "French shore").

I am instructed to inform your excellency that, in view of the fishery right conferred on France by the treaties in the part of the island to which the decree applies, a right which can evidently not be restricted in its exercise, it is impossible for my Government to recognize in any way the validity of the measure taken by the Newfoundland authorities.^b

The decree of the Newfoundland Government, to which Count d'Aubigny referred, was professedly for the purpose of preserving the lobster fishery by establishing a closed season for three years.^c

On July 5, 1887, the Marquis of Salisbury responded to the statement of Count d'Aubigny as follows:

With reference to Count d'Aubigny's letter of the 20th September last, in regard to the prohibition by the Newfoundland government of fishing for lobsters in Bonne Bay, I have the honor to acquaint your Excellency that a despatch has been received from the governor of that colony in which he states that his Government have given a formal assurance that the prohibition will not be enforced against French citizens to whom there had not been any intention of applying it.^d

^a U. S. Counter Case, Appendix, 308.

^b U. S. Counter Case, 19, 20; Appendix, 316, 317.

^c U. S. Counter Case, Appendix, 319.

^d U. S. Counter Case, Appendix, 322.

A reference to the correspondence in the French controversy is unnecessary to show the complete recognition of the real character of such a right as that enjoyed by fishermen of the United States under the treaty of 1818 and its effect in limiting British territorial sovereignty, in view of the declaration of Lord Salisbury to Mr. Evarts in his letter of November 7, 1878:

On the other hand, Her Majesty's Government will readily admit—what is, indeed, self evident—that British sovereignty, as regards those waters, is limited in its scope by the engagements of the treaty of Washington, which cannot be modified or affected by any municipal legislation.^a

The statesmen of Great Britain appear to have recognized the real character of the American fishing right from the very beginning. On November 6, 1818, Mr. Gallatin, one of the negotiators of the treaty of 1818, wrote to Mr. Adams, Secretary of State, as follows:

That right of taking and drying fish in harbors within the exclusive jurisdiction of Great Britain, particularly on the coasts now inhabited, was extremely obnoxious to her, and was considered as what the French civilian call a servitude.^b

THE CORRESPONDENCE OF 1905-1907.

No occasion for a renewal of the controversy over fishery regulations on treaty coasts appears to have been presented until 1905, when, owing to the unfriendly attitude of Newfoundland toward American fishermen, it became necessary for Secretary Root to bring up the subject for discussion with Great Britain.

The correspondence, which ensued, is reviewed at length in the Case of the United States, and does not require a re-examination here.^c

It is sufficient for the present to point out that the arguments advanced by Mr. Root in his letter of June 30, 1906, have never been answered by Great Britain, but that Sir Edward Grey, in a note to Mr. Reid dated June 20, 1907, proposed a temporary arrangement of the fisheries question, pending submission to the United States of all British laws and regulations on the subject, with a view to their amendment.^d

Later a proposition was made by the United States to submit the question to arbitration before The Hague Tribunal,^e and that proposition led to the making of the Special Agreement under which this arbitration is held.

^a U. S. Case, Appendix, 658.

^b British Case, Appendix, 97.

^c U. S. Case, 207, et seq.

^d U. S. Case, Appendix, 1005.

^e U. S. Case, Appendix, 1008.

QUESTION TWO.

Have the inhabitants of the United States, while exercising the liberties referred to in said article, the right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States.

SCOPE AND MEANING OF THE QUESTION.

The position and contentions of the United States in relation to Question Two are stated fully in its Case and Counter Case,^a and it will here suffice to review them briefly with but little, if any, amplification, except in one particular which does not involve a discussion of the facts and was, therefore, left to be dealt with in the argument.

Question Two involves only the construction of the language of the treaty, and nothing outside the treaty and the sources of information proper to aid in its construction is presented to this Tribunal for its consideration by this Question. The attempt, therefore, of the British Case to present an entirely new question, namely, whether the United States may employ subjects of Great Britain as members of the crews of its fishing vessels contrary to the statutory provisions of Newfoundland, is entirely beside and outside the Question submitted. The Question submitted is the broad one, whether persons not inhabitants of the United States may be employed on American fishing vessels, not whether British subjects may be so employed contrary to the British laws. The Question, as before stated, arises directly on the treaty and is to be answered by the treaty. The extraneous question suggested by Great Britain imports into the case a new and additional element and one foreign to the treaty, namely, the laws and the effect of the laws of Great Britain.

^a U. S. Counter Case, 45-53.

The United States submits, quoting from its Counter Case, that "the Question certainly does not ask whether there is anything in the treaty requiring or authorizing British subjects to engage themselves as members of the fishing crews of the inhabitants of the United States, if they are prohibited or even if they are not prohibited from so doing by British laws, which is all that is involved in the British contention above set forth."^a

There is a suggestion in the British Case that the United States appears to contend that inhabitants of Newfoundland may take employment on American fishing vessels and that any prohibition against their doing so is a breach of the treaty. In reply to this suggestion it is sufficient to say that, whatever the views of the United States may be upon the subject, no such contention is presented by it in this case, because it is not embraced within the submission by which this Tribunal is bound. The question is not in the case, and is only suggested in the British Case as a possible contention of the United States, and there is, therefore, no occasion to discuss it in this argument.

ERRONEOUS ASSUMPTION IN THE BRITISH CASE AS TO THE INTENTION OF THE NEGOTIATORS.

The two Governments did not enter into the treaty of 1818 for the benevolent purpose suggested in the British Case, namely, to give occupation to American fishermen who would otherwise suffer for bread. Nor was it the purpose of Great Britain in entering into the treaty to foster in the United States "a race of seamen conducive to the national riches in peace and to defense and glory in war." On the contrary, the correspondence which preceded the making of the treaty shows that whatever was the motive of the United States, the motive of Great Britain was wholly economic and in accord with the policy, which she has so long and so successfully pursued, of making treaty engagements which will develop markets in other countries for her manufactured articles. Any construction of the treaty, therefore, based upon the fictitious motives for making it, which are stated in the British Case, would proceed on false premises and lead to erroneous conclusions.

^a U. S. Counter Case, 46.

THE EVARTS REPORT.

The British Case quotes a statement made by Secretary of State Evarts in 1880, in his report to the President on the treaty of 1871, as sustaining its contention with reference to Question Two. That statement was as follows:

There was, to be sure, a restriction imposed upon both countries which excluded both equally from extending the enjoyment of either's share of the common fishery beyond the "inhabitants of the United States" on the one side, and "Her Britannic Majesty's subjects" on the other, thus disabling either Government from impairing the share of the other by introducing foreign fishermen into the common fishery.^a

It is evident, when the statement of Secretary Evarts is read in connection with its context, that nothing was further from his mind than the proposition under consideration. He was arguing that the treaty of 1871 had effected a division of the fisheries between the two nations—the fisheries in their natural extent—and he deduced therefrom that neither nation could extend the enjoyment of the fisheries beyond its own people, nor impair the share of the other by introducing foreign fishermen into the common fishery. He was manifestly referring to extensions of "either's share of the common fishery beyond the inhabitants of the United States" on one side, and "Her Britannic Majesty's subjects" on the other, by treaties with foreign countries introducing "foreign fishermen into the common fishery." This fishery he considered was held in equal undivided parts by the United States and Great Britain, and could not be impaired by either without the consent of the other. No question had then arisen or been remotely suggested of the possibility of a contention that the inhabitants of the United States were limited in the human instrumentalities which they might employ in carrying on their fisheries, because the treaty grant was to "inhabitants of the United States."

REFUTATION OF THE BRITISH CONTENTIONS.

As shown in the Counter Case of the United States, the contention of Great Britain is, not that every person on board an American fishing vessel must be an inhabitant of the United

^a British Case, Appendix, 284.

States, but that no such person is entitled to take fish unless he is an inhabitant of the United States. Taking up this contention of Great Britain the United States presents the following considerations:

1. It has been shown in the discussion of Question One that the fishery right granted by the treaty of 1818 was a national right held by the United States for the benefit of its inhabitants. The United States regards its right in this fishery as the foundation of a national industry, which not only furnishes a source of food supply for its own people, but gives to it a medium of exchange with the world at large which will add to its national wealth. That the fishery to its fullest extent was to be enjoyed by the United States for both domestic and export purposes was avowed by the representatives of the United States prior to the making of the treaty of 1783 and prior to the making of the treaty of 1818.^a

By the municipal law common to the two countries, if a fishery right is one of profit and not of pleasure, it carries with it the right of exercise by a master and his servants. If of pleasure alone, it can be exercised only by the master.^b

It is submitted that the rule of the common law of England and the United States is based on sound reason and justice; and, therefore, that a similar rule must, under the broad and equitable principles of international law, be applied by this Tribunal to the determination of the Question here submitted.

2. It is conceded that the granting nation may accompany such a grant as that under consideration with such conditions in respect of its exercise as it may deem proper and if the use of the words "inhabitants of the United States" in the granting part of the treaty was intended to limit the exercise of the right, in the sense that only inhabitants of the United States should engage in the manual act of fishing in British waters, that would be the rule to be followed. That the words were used with that intention appears to be the British view according to the letter of Sir Edward Grey quoted in the Counter Case of the United States.^c Such a position,

^a U. S. Case, Appendix, 220, 221, 223, 225, 267, 272, 273.

^b *Duchess of Norfolk's Case*, Yearbook, 12 Hen., 7, 25; 13 Hen., 7, 12, pl. 2; *Wickham & Hawker*, 7 Mees. & W., 63-77, by Baron Parke.

^c U. S. Counter Case, 48.

it is submitted, is narrow in the extreme and is inconsistent with the intention of the treaty.

The words in question clearly were not intended as a limitation. They were words of grant and were intended to describe the grantee. They are affirmative words, not words of negation or limitation. If a limitation follows from their use it could only be because the nature of the right granted and the character in which the grantee took the right imperatively require such limitation, but, as has been shown, the nature of the right and the character in which it was taken not only do not require any such limitation but conclusively negative it.

3. If the narrow construction contended for by Great Britain be the correct one, then it follows that inhabitants of the United States who wish to take fish in the waters of the treaty coast must themselves take the fish out of the water, and have no right to employ non-inhabitants to do that work for them. What policy could Great Britain have had in 1818 requiring the imposition of such a limitation? What policy, it may be asked, dealing with the subject from a broader view, could Great Britain have had in 1818 to introduce any limitation concerning the crews of fishing vessels? As a matter of fact there would have been no advantage to Great Britain at that time, from any point of view, to stipulate against the employment of foreigners in American fishing crews.

4. If the fish are taken for the benefit of inhabitants of the United States, by employees who are not such inhabitants, it is a taking by inhabitants of the United States in the sense of the words used, considered either in their ordinary significance or in their legal significance of the law, in as much as an act performed by an agent is held to be that of the principal. What Great Britain was concerned about was to guard her fisheries against use by any nation other than the United States, and this is the full extent to which the use of the words "inhabitants of the United States" in connection with the grant of the fishery right may be considered as a limitation. The purpose of Great Britain was to confer on the United States for the benefit of its inhabitants the right of fishery to be enjoyed by such inhabitants, but by them alone, in any proper

way or manner that such a fishery might be enjoyed. It was well known that the fishery on the part of the United States was to be a vessel fishery and that the enjoyment of the fishery involved the fitting out of seagoing vessels, the engaging of crews many of whom might never have occasion to drop a line in the water, and long and perilous voyages across a stormy sea, each voyage lasting several weeks. Who the crews of such vessels might be and of what nationality was wholly irrelevant. To assume that Great Britain had in view some purpose of regulating the crews of the American fishing vessels, or, to descend to the exact British contention, that she had the purpose of regulating the mere act of taking the fishes from the water, and intended to require that such act should be performed by none other than American inhabitants, would be, with all due respect, to convict her of a purpose absolutely without reason, a purpose puerile and absurd and contrary to the strong common sense which has ever governed her conduct.

5. A reference to analogous provisions in other treaties between the two nations will illustrate how strained and unsubstantial is the view which Great Britain is advancing with reference to the meaning of this provision.

For example, the treaty of 1794 (the Jay Treaty) provided, "that the citizens of the said United States may freely carry on a trade between the said territories [the East Indies] and the said United States in all articles of which the importation or exportation respectively to or from the said territories, shall not be entirely prohibited," etc.^a

Nobody has ever suggested, with reference to this provision, that the right which it secured of carrying on trade, in all the manifold shapes and forms which it might assume, was to be confined to citizens of the United States alone, and that they were debarred the right to employ persons of any nationality to assist them in carrying it on.

In the commercial treaty of 1815 between the two countries, it was provided that "the inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers in the territories aforesaid, to which other foreigners are permitted to come," etc.^b

^a British Case, Appendix, 20.

^b British Case, Appendix, 29.

Would it ever be contended that this mutual privilege was confined in its every form and manifestation to those who were inhabitants of the two countries, and that they must man their ships and handle their cargoes with none but inhabitants?

Again, in the mutual privileges secured to the two countries, by Articles 26 and 28 of the treaty of 1871, to navigate certain rivers and lakes, such privileges are expressed as belonging to "subjects of Her Britannic Majesty" in the one case, and to "citizens of the United States" in the other.^a

It would be unreasonable to contend that by these provisions the privilege of the citizens and subjects of the two countries, respectively, to navigate such rivers and lakes was intended to be limited as to the manner and the instrumentalities which they might find it convenient and profitable to employ, including crews of any nationality. Yet such contention would be no more unreasonable than the present British contention that the treaty of 1818 limits the inhabitants of the United States, in carrying on the fishery granted to them, to certain prescribed human instrumentalities.

6. The contention in the British Case that there is no ascertainable limit to the amount of fish that may be taken, if inhabitants of the United States may employ others to act for them, and that it can not be assumed that Great Britain conceded a right so indefinite in extent, ignores the broad meaning of the word *inhabitants* as used in the treaty. An *inhabitant* by the English and American law is a resident, as distinguished from a mere visitor or sojourner. No particular time, however, is essential to the acquirement of a residence. Residence is a matter of intention and becomes fixed and established when one takes up his abode in a particular place with the intention of remaining there. It is evident, therefore, that Great Britain did not employ the word or assent to its employment with a view of limiting the American fishing right by limiting the character of persons by whom it might be carried on. Furthermore, the idea has no foundation that such a nation, as the United States is now, or was in 1818, would be limited in the amount of fish it might take by limiting to its own inhabitants the agency which might actually take fish. The amount of fish to be taken, whatever the limitation on the agency,

^a British Case, Appendix, 41.

would be commensurate with the requirements of the nation, for its internal and external trade; and that the United States could not and would not, if required, find sufficient agencies of its own to fully exhaust the right granted it, both for internal supply and export demand, is an idea, it is submitted, that never found lodgment in the minds of the negotiators on either side.

7. The United States denies that the position which it has assumed on this Question can lead to the result suggested in the British Case, namely—

If the nationality of the ship, or of the owner of it, and not the nationality of the fishermen actually engaged in the fishing, be the test of the right to fish under the treaty, then fishermen of other countries can obtain access to these fisheries, subject to such restrictions as the law of the United States may from time to time impose. They may, by charter or arrangement, obtain control of an American vessel, or they may engage to serve on an American vessel. Once on board, their nationality, according to the contention of the United States becomes of no importance; the moment they have entered British waters under the American flag they become entitled to the full rights conferred by the treaty. This is no fanciful objection. The British North American fisheries are of great value, and would be eagerly competed for by foreign fishermen if it became known that access could in any way be obtained to them.^a

On the facts here assumed the fishing would not be by inhabitants of the United States in any sense. The United States does not maintain that being on board an American fishing vessel gives the right to fish under the treaty, but that being on board such a vessel under engagement to fish for an inhabitant or inhabitants of the United States does give such right. No foreigner, not an inhabitant, can charter an American vessel and thereby entitle himself to fish under the treaty. He would be fishing for himself as much as if fishing on a vessel of his own nationality. On the other hand, if he be on an American vessel engaged in a *bona fide* fishing venture for and in the interest of American inhabitants, his act is the act of his principals, and, even though he be a non-inhabitant, his act does not constitute the taking of fish by a non-inhabitant. The position of Great Britain apparently is that the fisherman is to be considered separate and apart from the vessel, for which he fishes, and

^a British Case, 58.

without reference to his engagement as a member of the fishing crew by an American inhabitant. If he be an American inhabitant, he may, in the British view, fish in treaty waters, no matter how he got there, and no matter who is to be the beneficiary of his labors. Under that view it would be possible, indeed, for American fishermen to throw the fisheries open to the entire world and to introduce all the evils and hardships which the British Case apprehends and deprecates. American fishermen could engage on a French or a German or a Spanish vessel, take fish for it in treaty waters, and, when the vessel had procured a full fare, it could depart for its home port without being liable to detention or interference. Its owners would not have been fishing. Nobody fished but the Americans, who had a right to fish and to dispose of their fish as they pleased. If any such construction as that be given the treaty, there will be no dearth of American fishermen to take the fish from treaty waters and deplete the supply not alone for their own benefit, but as well for the benefit of persons other than the inhabitants of the United States.

8. The British view on Question Two is not consistent with that taken on Question One. The contentions of the two Governments with respect to the meaning of the words "in common" unite in the view that they secure to American fishermen an equal right with those of Great Britain. The divergence of view is with reference to the right concerning which there is equality—the American view being that it is the fundamental, complete, and unlimited right of Great Britain in the fisheries, the British view being that it is such right only as British fishermen are permitted to enjoy under statutory regulations. But either view, upon the record presented to this Tribunal, is sufficient to sustain the right of Americans to employ non-inhabitants in the crews of their fishing vessels. Under the American view, Great Britain, having the right to authorize and permit non-inhabitants and foreign subjects to assist her subjects in their fishing operations, the equality of right in the United States implied from the words "in common" would entitle the latter to have and exercise the same right. Under the British view American fishermen are to have the same right in every respect that British subjects are permitted to enjoy. Great Britain would have no right even under that view to

deny Americans the assistance of non-inhabitants unless she had denied her own subjects the like assistance. The British statutes, which have been submitted in evidence by the two Governments, do not show that Great Britain has undertaken to so limit her own fishermen. If there are any such limiting British statutes, it is submitted that Great Britain, on her own theory of the case, must show them.

QUESTION THREE.

Can the exercise by the inhabitants of the United States of the liberties referred to in the said article be subjected without the consent of the United States, to the requirements of entry or report at custom-houses, or the payment of light, or harbor, or other dues, or to any other similar requirement, or condition, or exaction?

SCOPE AND MEANING OF THE QUESTION.

The British Case states the issues raised by the foregoing Question thus:^a

The "liberties" referred to in this question are:

1. Liberty to "take fish" on certain coasts, bays, harbours, and creeks; and

2. Liberty to "dry and cure fish" in certain unsettled bays, harbours and creeks—that is, upon the shore.

3. In addition to these two liberties, the United States asserts that its fishermen are entitled to have, for their fishing vessels, the same commercial privileges as are accorded by agreement or otherwise to United States trading vessels generally.

The question then seems to be whether United States fishing vessels are entitled to frequent British coasts, bays, creeks, and even harbours, to land upon British territory, and (if the United States contention be correct) to exercise all the privileges accorded to trading vessels, and yet be exempt from the supervision which all nations exercise over all vessels (not only foreign but their own) coming into their harbours and discharging upon their territory; and exempt also from contribution to the up-keep of lights necessary to the navigation of the waters.

This statement is lacking in that precision which should be employed in stating the issues presented in this case, a lack of precision which it has been necessary to notice in dealing with the other Questions presented to this Tribunal. The United States has never asserted, and does not now assert, that commercial privileges for its fishing vessels constitute any part of "the liberties referred to

^a British Case, 61.

in the said article"—Article I of the treaty of 1818. Its position is, and always has been, that the treaty of 1818 neither conferred nor denied commercial privileges; and hence that during the period when Great Britain denied all nations the privilege of commercial intercourse with her colonies, neither American fishing vessels nor American vessels of any other character resorting to British-North American waters were entitled to touch and trade at colonial ports. When the policy of non-intercourse had been discontinued, and trading vessels of the United States were permitted intercourse with the colonies, there was nothing in the treaty of 1818 which debarred fishing vessels from commercial privileges. The United States, therefore, by granting its fishing vessels the right to touch and trade, could confer on them, in addition to the treaty right to fish, the commercial privileges which Great Britain, at a period subsequent to 1818, allowed to all American vessels. The distinction is obvious between a contention that commercial privileges were affirmatively granted fishing vessels by the treaty of 1818 and a contention that there is nothing in that treaty intended to except fishing vessels from commercial privileges whenever Great Britain's policy should allow other nations commercial intercourse with her colonies. The United States has never asserted the first, but has always consistently asserted the second contention.

The liberties referred to in the fisheries article, the exercise of which is the subject of Question Three, are but two, namely, (1) the liberty to take fish on certain coasts, and (2) the liberty to dry and cure fish on certain coasts.^a

These liberties carry everything necessarily incidental to the right to fish, and to dry and cure fish; and what is incidental may some time require ascertainment, but it is not pertinent to any Question before this Tribunal. It is clear that these liberties do not include general commercial privileges. Commercial privileges for its fishing vessels on the treaty coasts, so far as the United States has ever claimed them, grow out of acts of the two Governments outside of the treaty of 1818, and have no relation to it; and, whenever Great Britain has attempted to find some principle of exclusion of fishing vessels in the treaty of 1818, the United States has invariably denied that any such principle could be found in that treaty.

^a U. S. Counter Case, 55.

It should be stated further that, when the United States has furnished its fishing vessels with permits to touch and trade, and they have been accorded that privilege, it has never insisted on their immunity from British or colonial commercial and revenue regulations, requiring entry and clearance at custom-houses or the payment of light, harbor, or other dues. It has only been when the colonial governments denied trading privileges and held the American fishing vessels to the treaty right of fishing exclusively, that the latter have refused to conform to the colonial laws relating to entry and clearance at custom-houses and the payment of light, harbor, and other dues. Sir Edward Grey substantially admitted this in his memorandum of February 2, 1906,^a and the record will be searched in vain for any contention by the Government of the United States that its vessels were immune from such customs and revenue regulations when permitted to enjoy commercial privileges. The United States then disclaims that commercial privileges constitute any part of "the liberties referred to in the said article," and it admits that its fishing vessels when supplied by it with authority to exercise commercial privileges, and when permitted by the colonies to enjoy such privileges, are properly subject in British colonial ports, "to the requirements of entry or report at custom-houses, or the payment of light, harbor, or other dues, or to any other similar requirement, or condition, or exaction." It contends, however, that its fishing vessels, when resorting to the colonial waters exclusively for the treaty purpose of fishing, are not properly subject to any such requirements; and this contention on its part and the negation of that contention on the part of Great Britain constitute the sole issue for determination by this Tribunal under the submission of Question Three.

APPLICATION OF THE LAW OF SERVITUDES.

Addressing the argument to that issue the United States insists that the principles of international law do not permit Great Britain to subject the fishing vessels of the United States to the requirements and exactions mentioned in Question Three. As shown in the discussion of Question One, the right granted by the treaty of 1818 is a *real* right and constitutes an international servitude. The treaty

^a U. S. Counter Case, 57; British Case, 62.

contains no reservation of power in Great Britain to impose restrictions on the enjoyment of the servitude. Such a right conferred without reservation is to be exercised by the dominant nation independently, and without interference by the servient nation. Any limitation of the enjoyment of the right or burden placed upon it is an interference not countenanced by international law. Recognized authorities hold that it would be an illegal restraint upon the right to impose taxes or other duties on the exercise of the right or to make entrance into the servient territory dependent on conditions not expressly provided for in the treaty.^a

Although international law does not recognize any legal right in the servient state to impose any restrictions, nevertheless it contemplates that the comity, which prevails between nations, will enable the dominant and servient states, by supplementary agreement, to regulate the exercise of the right in any way that may be reasonable and mutually acceptable. That is exactly what the United States has always been willing to do. Secretary Root in his reply of July 20, 1906, to Sir Edward Grey's memorandum of February 2, 1906, said:

The Government of Newfoundland can not be permitted to make entry and clearance at a Newfoundland custom house and the payment of a tax for the support of Newfoundland light-houses conditions to the exercise of the American right of fishing. If it be shown that these things are reasonable the Government of the United States will agree to them, but it can not submit to have them imposed upon it without its consent.^b

^a Chrétien: *Principes de Droit International Public*, Sec. 259, p. 268.

^b F. De Martens: *Traité de Droit International*, Vol. I, sec. 93.

Von Holtzendorf: *Handbuch des Völkerrecht*, Vol. 2, Sec. 52.

Heffter: *Le Droit International de l'Europe*, Sec. 43.

Bluntschli: *Droit International*, Sec. 355, p. 212.

Despagnet: *Cours de Droit International Public*, Sec. 190.

Pradier Fodéré: *Traité de Droit International Public, European and American*, Sec. 834, 838.

Gareis: *Institutionen de Völkerrechts*, p. 205.

Rivier: *Principes du Droit des Gens*, Sec. 58.

Diena: *Principi di Diritto Internazionale*, p. 125.

Fiore: *Diritto Internazionale Codificato*, (4 Ed., 1909) Sec. 1096.

Oppenheim: *International Law*, (1905) Secs. 203, 205.

Clauss: *Lehre von den Staatsdeinstbarkeiten*, (1894) pp. 114, 198, 224, 227.

Klüber: *Droit des Gens, moderne de l'Europe*, pp. 194, 195.

Heilborn: *Des System Völkerrechts entwickelt aus den Völkerrachtlichen Begriffen* (1896) p. 30, 34.

Von Ullmann: *Völkerrechts*, (2 Ed., 1908) Sec. 99, 100.

Vattel's *Law of Nations*, 1758 (Chitty's translation with notes by Ingraham) Book 2, chap. 7, sec. 89, p. 168.

Dr. Alphonse Rivier: *Lerbuch des Völkerrechts*, (2 Ed.) p. 192.

Von Neuman: *Grundriss des Heutigen Europäischen Völkerrechts*, (1885) Sec. 13, pp. 31, 33.

^b U. S. Case, 225.

THE INTENTION OF THE NEGOTIATORS.

That the negotiators did not intend to subject American fishermen to any such requirements, and the reasons why they refrained from so doing will appear from an examination of the negotiations leading up to the treaty, and the circumstances and conditions existing at that time.

The south and west coasts of Newfoundland are bold, rocky, and inhospitable, icebound in the winter, and subject to violent tempests at all seasons of the year. The confluence in their neighborhood of the icy currents of the north with the warm Gulf Stream produces these storms and also the dense fogs which veil the coasts and make navigation in their vicinity extremely dangerous. It was not until a comparatively recent period that Great Britain permitted permanent settlements on the Newfoundland treaty coasts. The British Case^a recites the policy of exclusion which Great Britain pursued toward the island, and the British statutes amply show that policy, which was to discourage fishermen from settling on the island and reserve the fisheries for the British possessions in Europe. A report of a committee of the House of Commons of Great Britain appointed to inquire into the state of the trade to Newfoundland, dated April 24, 1793, contains the testimony of William Knox, previously connected with Lord North's ministry in England, who said that—

the Island of Newfoundland had been considered, in all former times, as a great English ship moored near the banks during the fishing season, for the convenience of the English fishermen. The Governor was considered as the ship's captain, and all those who were concerned in the fishery business as his crew, and subject to naval discipline while there, and expected to return to England when the season was over. * * * To prevent the increase of inhabitants on the Island the most positive instructions were given to the Governors not to make any grants of the lands and to reduce the number of those who were already settled there. Their vessels, as well as those belonging to the colonies, were to be denied any priority of right in occupying station in the bays or harbors for curing their fish over the vessels from England; and he was instructed to withhold from them whatever might serve to encourage them to remain on the Island; and as Lord North expressed it, whatever they loved to have roasted he was to give them raw; and whatever they wished to have raw, he was to give them roasted.^b

^a British Case, 6, 7, 8.

^b U. S. Counter Case, Appendix, 560, 561.

The repressive laws of Great Britain designed to prevent any development of the island and to secure to the possessions of Great Britain in Europe all the advantages accruing from the fisheries, are to be found in the order in council of March 10, 1670;^a 7 & 8 Wm. III, cap. 22, 1696;^b 10 & 11 William III, cap. 25, 1699;^c 15 Geo. III, cap. 31, 1775;^d 26 Geo. III, cap. 26, 1786;^e 29 Geo. III, cap. 53, 1789.^f

These laws, which made it possible for Lord North to give to residents of the Island raw that which they wanted roasted, and to give them roasted that which they wanted raw, remained in force until the year 1824, when they were repealed by the statute 5 Geo. IV, cap. 51.^g

In 1806 the population was only about 26,000. Back from the coast the island was an almost unbroken wilderness as late as 1852, and the only important settlements were confined to St. John, Ferryland, Fugo, Burin, the bays of Concepcion, Trinity, Bonavista, Fortune, Bulls, Placentia, and St. Mary's, none of which were on the treaty coasts.

The foregoing facts are taken from Sabine's Report on the Fisheries, published in 1853. He also stated:

The inhabitants [of the Island], as a body, are as ignorant of the interior of the Island as are others. To them, and to all the world, the Colony is known for its fisheries, and for these alone.^h

On the same subject the historian Bouchette said, in his work on "The British Dominion in North America," published in 1831:

As all the importance attached to this colony (Newfoundland) has arisen exclusively from its fisheries, little has been done on shore to claim our attention. The different settlements amount to about sixty or seventy in number, and are scattered on the shores of the eastern and southern sides of the island, but principally the former; there are indeed some inhabitants on the western shore near its southern extremity, but they do not extend northward of St. George's Bay, though the vicinity of that bay has proved extremely fertile.

* * * * *

Since several merchants, deeply engaged in the trade, have settled here (St. John's, Newfoundland), and many industrious inhabitants have by their consistent efforts raised themselves to comparative wealth and since the administration of justice has been placed on a

^a British Case, Appendix, 578.

^b British Case, Appendix, 520.

^c British Case, Appendix, 525.

^d British Case, Appendix, 543.

^e British Case, Appendix, 555.

^f British Case, Appendix, 563.

^g British Case, Appendix, 567.

^h U. S. Case, Appendix, 1179.

more permanent and certain footing than formerly, the state of society has continued rapidly advancing in respectability and civilization, and is now better than could be expected from a fishing station, the internal improvement of which has been so uniformly discouraged. The settlements continue almost continuously along the southern shore, as far as Fortune Bay, and at most of the harbours there are places of worship. The settlement at St. George's Bay is perhaps more agricultural than any other on the island.^a

The following extracts are reproduced from "British America" by M'Gregor, published in 1832 for the purpose of exhibiting the British policy in Newfoundland and the effects of that policy.

In 1674, however, farther application, by petition to the king, was made for a governor; and the petition being referred to the Lords of Trade and Plantations, their lordships proposed that all plantations in Newfoundland should be discouraged, and that the commander of the convoys should compel the inhabitants to depart from the island, by putting in execution one of the conditions of the western charter. His Majesty was induced to approve of this report; and under its sanction, the most cruel and wanton acts were committed on the inhabitants; their houses were burnt, and a variety of severe and arbitrary measures resorted to for the purpose of driving them from the country.

The extent to which the cruelties committed on the inhabitants had been carried, induced Sir John Berry, the commander of the convoy, about this time to represent to government the policy of colonizing Newfoundland. His advice, however, was not attended to.

In 1676, on the representation of John Downing, a resident inhabitant, his Majesty directed that none of the settlers should be disturbed. But in the following year, in pursuance of an order in council that had been made on the petition of the western adventurers, the Committee of Trade, &c., reported, that notwithstanding a clause in the western charter, prohibiting the transport to Newfoundland of any persons but such as were of the ship's company, the magistrates of the western ports did permit passengers and private boat-keepers to transport themselves thither, to the injury of the fishery; and they were of opinion that the abuse might hereafter be prevented by those magistrates, the vice admirals, and also by the officers of customs.

A petition, on the part of the inhabitants of Newfoundland, soon followed this representation; and in order to investigate the matter fully, it was ordered that the adventurers and planters should each be heard by their counsel. The question was thus seriously argued, and afterwards referred, as formerly, to the Committee of Trade; but no report seems to have been made on this occasion, and no steps for regulating the settlement or fishery of Newfoundland were adopted, until the Board of Trade, instituted in January 1697, took up the subject among others that came under their province. They made a report, which, however, applied more to the defence of the island, than to its civil regulations, and went no farther than to

^a U. S. Counter Case, Appendix, 565-566.

express an opinion, that a moderate number of planters, not exceeding one thousand, were useful in the construction of boats, stages, and other necessities for the fisheries. * * *

In 1690, the statute 10 and 11 William and Mary, cap. 25, entitled, "An Act to encourage the trade of Newfoundland", passed; but as the substance of this act appears to embody the policy of former times, it tended to no purpose other than to legalize misrule, and the capricious will of ignorant men, invested accidentally by it with authority.

These persons were distinguished by the dignified titles, or rather nicknames, of admirals, vice-admirals, and rear-admirals. The master of the first fishing vessel that arrived, was the admiral; the next, vice-admiral; and the third, rear-admiral, in the harbours they frequented. Few of these men could write their own names; and from this circumstance alone the absurdity of investing them with power must be apparent. * * *

Upon complaints being made to the commander on the station, it had been customary for him to send his lieutenants to the different harbours to decide disputes between masters of fishing vessels and the planters, and between them again and their servants; but upon such occasions, Mr. Larkins alleges those matters were conducted in the most corrupt manner. He that made a present of most quintals of fish, was certain to have a judgment in his favour. Even the commanders themselves were said to be, in this respect, faulty. After the fishing season was over, masters beat their servants, and servants their masters. * * *

The French, always, but now more than ever, anxious about their fishery, insisted on their having a right to the western coast, for the purpose of fishing as far south as Cape Ray; maintaining that it properly was "Point Riche," mentioned in the treaty of Utrecht. This claim embraced nearly two hundred miles of the west coast of Newfoundland more than they had a right to by treaty; and their authority being founded only on an old map of Hermann Moll, was shown, with great accuracy, by the Board of Trade, to be altogether inadmissible. The coast of Labrador was in 1763 separated from Canada, and annexed to the government of Newfoundland. This was a very judicious measure; but, as the chief object of those who at that time frequented Labrador, was the seal-fishery, the Board of Trade, at the recommendation principally of Sir Hugh Palliser, considered it unwise policy to separate Labrador from the jurisdiction of Canada; and accordingly recommended his majesty to reannex it. This was effected in 1774, and in the following year an act was passed, the spirit of which was to defend and support the ship fishery carried on from England.

Its principal regulations were, that the privilege of drying fish on the shores should be limited to his majesty's subjects arriving at Newfoundland from Great Britain and Ireland, or any of the British dominions in Europe. This law set at rest all that had been agitated in favour of the resident colonists. * * *

It is certain that none of the British plantations have been worse governed than Newfoundland, nor in any has more confusion prevailed. By the constitutions granted to all the other colonies, a clearly defined system of jurisdiction was laid down; but the admin-

istration of Newfoundland was, in a great measure, an exclusively mercantile or trading government; which, as Adam Smith very justly observes, "is perhaps the very worst of all governments for any country whatever;" and a powerless planter, or fisherman, never expected, or seldom received, justice from the adventurers, or the fishing admirals, who were their servants. Mr. Reeves, in his History of Newfoundland, states, "that they had been in the habit of seeing that species of wickedness and anarchy ever since Newfoundland was frequented, from father to son; it was favourable to their old impressions, that Newfoundland was theirs, and that all the plantations were to be spoiled and devoured at their pleasure.

There is no doubt but that so arbitrary an assumption and practice of misrule produced the consequences that severity always generates; and that the planters soon reconciled themselves to the principles of deceit and falsehood, or to the schemes that would most effectually enable them to elude their engagements with the adventurers. The resident fishermen, also, who were driven from time to time out of Newfoundland, by the statute of William and Mary, generally turned out the most hardened and depraved characters wherever they went. * * *

The whole of the west coast of Newfoundland, north of the bay St. George, is unsettled, although some of the lands are the best on the island. At the bay of Port au Port there is plenty of coal. The Bay of Islands receives three fine rivers, one of which, called the Humber, runs out of a large lake. Farther north is Bonne Bay, which branches into two arms; and then follow several small coves, bays and rivers, for about sixty miles, where the Bay of Ignorachioix, containing three harbours, enters the island.

A few miles nearer the strait of Belle Isle, St. John's Bay is situated, containing several islands, and receiving the waters of Castor river, which flows through about thirty miles of country. The lands about this bay are mountainous. The coast, for about thirty miles north, is indented with small rivers and numerous minor inlets; and then along the strait of Belle Isle to Cape Norman, the most north-westerly point of Newfoundland, a straight shore prevails, along which an old Indian path is observable.

MAGDALEN ISLANDS.

This cluster of islands is situated within the Gulf of St. Lawrence, seventy-three miles distant from Newfoundland, sixty miles from Prince Edward Island, and sixty-five miles from Cape Breton. They are the property of Sir Isaac Coffin, who appears to take very little interest in them. The inhabitants about 500 in number, are Arcadian French, who live principally by means of fishing. In the month of April, they go in their shallops among the fields of ice that float in the gulf, in quest of seals; and in summer, they employ themselves in fishing for herring and cod.* * *

Custom-houses were not established on the south coast, westward of Fortune Bay, before 1848, nor on the western coast of the island

before 1877, nor on the coast of Labrador before 1864. The customs-service on the last named coast consists to this day of an officer on board a vessel, a custom-house at Blanc Sablon established in 1864, and a custom-house at Rigoulette established in 1902.^a

The coast of Labrador is a bold, rocky, forbidding shore, and is even today incapable of supporting more than a very limited population.

This Tribunal, putting itself in the place of the two Governments and their representatives when negotiating the treaty of 1818, can realize, in the light of the foregoing facts, how unnecessary it was to require American fishing vessels visiting the treaty coasts, to conform to customs regulations or to pay light or harbor dues; and the Tribunal will then be in a position to determine whether or not the treaty, which is silent on the subject, contemplated the observance by American fishing vessels of any such requirements or exactions. It is a familiar rule of construction that that which was within the contemplation of the parties is as much a part of the contract or treaty as if therein written, and that that which was not within the contemplation of the parties, and was not written into the contract or treaty, is and can be no part of it. The United States submits, considering the nature of the fishing pursuit, the little value of the vessels engaged in it, the indulgence uniformly extended toward such vessels, the uninhabited condition of the coasts to which the American right of fishing was confined, and the undoubted policy of Great Britain to keep the coasts in that condition, a policy, which was still vigorously pursued in 1818, that it was not within the contemplation of the treaty that the American fishing vessels should be subjected to exactions or requirements of any kind while on the treaty coasts, so long as they confined themselves to the exercise of their treaty rights within the treaty waters. Great Britain neither expected nor desired conditions to arise on those coasts which would make such exactions and requirements either necessary or desirable, and certainly no such conditions actually existed when the treaty of 1818 was entered into.

That no such requirements or exactions were contemplated, in the negotiations leading up to the treaty of 1818, is evident from the

^a U. S. Counter Case, Appendix, 637.

letter of December 31, 1816, from Mr. Bagot to Mr. Monroe, tendering a renewal of the fishing right on the coast of Labrador and on the south coast of Newfoundland. Mr. Bagot said in that letter:

In consenting to assign to their use so large a portion of His Majesty's coasts, His Royal Highness is persuaded that he affords an unquestionable testimony of his earnest endeavor to meet, as far as is possible, the wishes of the American Government, and practically to accomplish, in the amplest manner, the objects which they have in view. The free access to each of these tracts can not fail to offer every variety of convenience which the American fishermen can require in the different branches of their occupation; and it will be observed that an objection which might possibly have been felt to the acceptance of either of the propositions, when separately taken, is wholly removed by the offer of them conjointly; as, from whatever quarter the wind may blow, the American vessels engaged in the fishery will always have the advantage of a safe port under their lee.^a

The same fact is also evident from the statement of the American plenipotentiaries to the plenipotentiaries of Great Britain, reported in the letter of Messrs. Robinson and Goulburn to Viscount Castlereagh in September, 1818, as follows:

They added that while they could not but regard the propositions made to the Government of the United States by Mr. Bagot as altogether inadmissible, inasmuch as they restricted the American fishing to a line of coast so limited, as to exclude them from this fair participation, they had nevertheless been anxious in securing to themselves an adequate extent of coast, to guard against the inconveniences which they understood to constitute the leading objection to the unlimited exercise of their fishing. With this view they had contented themselves with requiring a further extent of coast, in those very quarters which Great Britain had pointed out, because it appeared to them that the very small population established in that quarter, and the unfitness of the soil for cultivation rendered it improbable that any conduct of the American fishermen in that quarter could either give rise to disputes with the inhabitants, or to injuries to the revenue.^b

The same fact is also evident from the protocols of the conferences of the negotiators of the treaty of 1818. At the fifth conference held October 6, 1818, the British negotiators presented the draft of an article relating to the fisheries in which were stipulations against fishing in rivers, setting nets across the mouths of rivers, carrying on trade with British subjects, and, in order to guard against smuggling, a stipulation against having on board American fishing vessels

^a U. S. Case, Appendix, 293.

^b British Case, Appendix, 86.

any goods, wares, and merchandise not necessary for the prosecution of the fishery or the support of the fishermen.^a

On the next day, Oct. 7, the American negotiators replied by a note to the proposals of the prior day, and addressing themselves to the stipulations regarding the spreading of nets and having on board dutiable goods stated that—

Their instructions did not anticipate that any new terms or restrictions would be annexed, as none were suggested in the proposals made by Mr. Bagot to the American Government. The clauses forbidding the spreading of nets, and making vessels liable to confiscation in case any article not wanted for carrying on the fishery should be found on board, are of that description, and would expose the fishermen to endless vexations.^b

The British plenipotentiaries yielded to the view of the American plenipotentiaries, as is shown by the following extract from the letter of October 10 from Mr. Robinson to Viscount Castlereagh:

I then proceeded to state to them that upon the fishery article, we were not disposed to insist upon the exclusion of those points, the introduction of which they had at our last conference represented to be a *sine qua non*; and after some discussion it was also agreed on our part not to insist upon the two provisions contained in our proposed article respecting the fishing in rivers and smuggling, to which they felt very considerable objections, and which did not appear to me to be of such importance as to require to be urged in a way that might prevent an arrangement upon the fisheries taking place.^c

Why did the provision against smuggling appear to the British negotiators to be of such slight importance that they abandoned it and the other restrictive provisions noted, as soon as they were objected to? Manifestly because of the uninhabited and uninhabitable coasts to which the American right of fishing had been confined, and the absence of any expectation in the mind of anybody at that time that any such provisions would ever be necessary to protect the British or colonial revenues from the illicit trade by American fishing vessels. The coasts were barren and uninhabited, and it was never expected that they would have any trade to protect or any of the concomitants of maritime commerce such as ports of entry, custom-houses, and light-houses.

^a U. S. Case, Appendix, 312-313.

^c British Case, Appendix, 92.

^b U. S. Case, Appendix, 314.

CUSTOMARY EXEMPTIONS ACCORDED FISHING VESSELS.

The argument would be very strong against a presumption of an intention to require entry or report at custom-houses and payment of light, harbor, and other dues, under such a treaty as that of 1818, which contains no reservations, even if the fishing liberty had been granted on coasts with fixed and settled populations.

The indulgence due to fishing vessels on account of their necessities, the poverty of those who engage in the vocation of fishing, the little profit which accrues from their labor, the necessity of moving freely in and out of the territorial waters without restriction if the fishing venture is to be remunerative, the petty character of any frauds which the fishermen might commit on the revenues if so disposed, and the certainty of detection sooner or later, together with the knowledge that they must return to the coast again and again in their business and thereby brave both detection and punishment, are all factors which would necessarily have entered into the minds of negotiators of such a treaty, and which, in the absence of a reservation or of restrictive provisions, would, it is submitted, conclusively negative any intention to require that the vessels enter or report every time they come within the territorial waters, or that they be burdened with exactions and dues which they can ill afford to pay, and from which, in consideration of their character, domestic fishing vessels are almost universally exempt.

By the British Act of 1775 (15 Geo. III, Cap. 31), British fishing vessels resorting to Newfoundland were exempted from entry at the custom-house, except a mere report by the master on arrival and departure, for which he was to pay 2s 6d, and it was provided that "no other fee shall be taken or demanded by any officer of the customs there upon any other pretence whatsoever relative to the said fishery, any law, custom or usage to the contrary notwithstanding."^a

It appears that formerly Newfoundland laid a small tonnage tax on fishing vessels for the support of light-houses, but always much less than that imposed on trading vessels. The Newfoundland Act of 1899, however, more consonant with the indulgent spirit which animates most nations in dealing with such vessels, expressly exempted domestic fishing vessels from all such dues.^b

^a British Case, 65.

^b British Case, Appendix, 754.

In consequence of the Newfoundland Act of 1899, Sir Edward Grey in a note to the American ambassador at London, dated June 20, 1907, very properly conceded the injustice of attempting to make American fishing vessels pay light dues. He said:

These dues are payable by all vessels of whatever description and nationality, other than coasting and fishing vessels owned and registered in the Colony. As, however, vessels of the latter class are under certain conditions exempt either wholly or in part from payment, His Majesty's Government consider that it would be unfair to introduce any discrimination against American vessels in this respect, and it is proposed that the demand for light dues should be waived under the same conditions as in the case of the Newfoundland vessels.^a

This declaration of the British foreign secretary, made so recently, and while the subject was under discussion by the two Governments, should be conclusive on Question Three so far as the imposition of light dues on American fishing vessels is involved. On another feature of this Question, a statement by Lord Elgin, the British colonial secretary, should be equally conclusive. The statement was contained in the despatch of Lord Elgin to Governor McGregor, of September 3, 1906, and was as follows:

As regards call at custom-house, your Ministers are of course aware that the negotiations which led up to the Convention of 1818 virtually bind His Majesty not to exact customs duties in respect of goods on board United States vessels necessary for prosecution of fishery, and support of fishermen during fishery, and during voyages to and from fishing grounds.^b

The foregoing discussion, it is submitted, has shown that neither Great Britain nor the United States contemplated, when they entered into the treaty of 1818, any interference with American fishing vessels when on the treaty coasts, either in the matter of report at customs-houses or in that of the payment of light dues, harbor dues, or exactions of any character whatever, and that such requirements and exactions are for that reason not authorized by the treaty.

CANADIAN ATTITUDE TOWARD CHANGED CONDITIONS.

Even if conditions have materially altered since the date of that treaty, and have created, as Great Britain insists, the necessity for some kind of supervision over all kinds of vessels visiting the treaty

^a U. S. Case, Appendix, 1007.

^b U. S. Case, Appendix, 989.

waters, such altered conditions cannot change the meaning of the treaty. This rule was well stated in the report of the Privy Council of Canada, approved by the Governor-General, on the 14th June, 1886. That report, speaking of a contention as to trading privileges put forth by Mr. Bayard, then Secretary of State, said:

The undersigned is of opinion that while, for the reasons which he has advanced, there is no evidence to show that the Government of Canada has sought to expand the scope of the convention of 1818 or to increase the extent of its restrictions, it would not be difficult to prove that the construction which the United States seeks to place on that convention would have the effect of extending very largely the privileges which their citizens enjoy under its terms. The contention that the changes which may from time to time occur in the habits of the fish taken off our coasts, or in the methods of taking them, should be regarded as justifying a periodical revision of the terms of the treaty, or a new interpretation of its provisions, cannot be acceded to. Such changes may from time to time render the conditions of the contract inconvenient to one part or the other, but the validity of the agreement can hardly be said to depend on the convenience or inconvenience which it imposes from time to time on one or other of the contracting parties. When the operation of its provisions can be shown to have become manifestly inequitable, the utmost that good will and fair dealing can suggest is that the terms should be re-considered and a new arrangement entered into; but this the Government of the United States does not appear to have considered desirable.*

CONCLUSION.

The elimination of commercial privileges from consideration as one of the liberties referred to in this Question obviates the necessity of extended reply to much that has been said in the discussion of it in the British Case. The practice of Great Britain, or of the United States, or of the British colonies, in dealing with trading vessels coming into their ports in relation to entry or report at custom-houses, and the exaction of light, harbor, and other dues, is not pertinent to the question at issue.

The Question to be determined is not what is or has been customary in the case of either trading or fishing vessels, but, looked at in the light of conditions surrounding the Newfoundland and Labrador fisheries in 1818, and the known policy of Great Britain with reference to them and the shores on which they were carried on, what

* U. S. Case, Appendix, 817, 818.

did the negotiators of the treaty of 1818 contemplate with reference to the various requirements, the right to impose which is now claimed by Great Britain? Did they intend to subject to such requirements the fishing vessels of the United States resorting to the bleak and inhospitable shores of western and southern Newfoundland and eastern Labrador, destitute alike of people with whom to trade, of ports in which to report, and of light-houses to light the fishing vessels on their way?

QUESTION FOUR.

Under the provision of the said article that the American fishermen shall be admitted to enter certain bays or harbors for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbor or other dues, or entering or reporting at custom-houses or any similar conditions?

SCOPE AND MEANING OF THE QUESTION.

The position of the United States as to the scope and meaning of this Question is, as stated in its Counter Case:

No question involving the obligation of American fishing vessels, or the treatment of such vessels, when enjoying commercial privileges on the non-treaty coasts, is included in this Question or in any of the other Questions submitted to this Tribunal for decision. In this Question, therefore, as in Question Three, the obligations and treatment of American fishing vessels, when permitted to enjoy general commercial privileges, must be eliminated from the discussion. As pointed out, in the Case of the United States, the action complained of is not the imposition of harbor dues or the requirement of customs entry in respect of American vessels permitted to enjoy commercial privileges on these coasts, but the imposition of such conditions and exactions upon fishing vessels exercising their treaty right of entering the bays and harbors on these coasts for the purposes specified in the treaty, when at the same time such vessels are not permitted to enjoy commercial privileges.^a

As thus pointed out, the latter class of vessels alone is referred to in this Question, and this argument will deal with vessels of that class only.

The positions taken by the United States with reference to Question Three—except the position founded on the British policy toward the island of Newfoundland—apply with added force to this Question. Whereas the fishing vessels on the treaty coasts were

^a U. S. Counter Case, 61.

expected to be and would necessarily be within the British territorial jurisdiction for considerable periods, the privileges accorded to them on the non-treaty coasts were exceptional, and by their nature availed of only occasionally and in each case for only a short time.

LOCAL CONDITIONS ON NON-TREATY COASTS.

The non-treaty coasts, to which the privileges under consideration applied, had but few settlements in 1818; there were only four light-houses on the entire coast, two of them within the Bay of Fundy and two on the outside coast of Nova Scotia south of Halifax; and the small and scattered settlements forbid the idea that there could have been an extensive trade or that an extensive customs service had then been organized. Throughout the entire extent of the non-treaty coasts of Newfoundland, and from the Bay of Fundy to Blanc Sablon on the coast of Labrador, embracing thousands of miles of deeply indented shores, there were not a score of custom-houses or ports of entry in the year 1818. Furthermore, with the considerable population of today and the extensive trade on these coasts, the ports of entry at which vessels must call, if required to report at custom-houses, are still comparatively few in number and widely separated. The cost of maintaining a customs officer in every bay or harbor on such a coast would far outmeasure the value of any possible protection to the revenues; and this fact, as well as the physical character of the coasts, could not have escaped the attention of the negotiators of the treaty of 1818.

To require a fishing vessel seeking shelter, repairs, wood, or water in any of these bays or harbors to go out of its way to find a port of entry, possibly a hundred miles distant, in order to report that it had availed itself of a treaty privilege, would be intolerable, and render the enjoyment of the privilege so onerous that it would practically destroy its value. Nevertheless, this Tribunal is asked by Great Britain to find that the negotiators of the treaty of 1818, in securing to American fishing vessels the privilege of seeking these neighboring and friendly shelters, intended to attach to the enjoyment of the privilege conditions so burdensome and difficult of performance. The bare statement of the proposition is its own refutation.

RESTRICTIONS LIMITED TO THOSE NECESSARY FOR THE PURPOSES SPECIFIED IN THE TREATY.

Moreover, the very terms of the treaty present a significant feature which in itself would be sufficient to defeat the British contention. The treaty, as above pointed out, is silent as to requirements and exactions with reference to the treaty coasts, but in express terms it provides the measure of supervision which may be exercised over fishing vessels seeking the bays and harbors on the non-treaty coasts.

They shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any manner whatsoever abusing the privileges hereby reserved to them.

What the restrictions on fishing vessels were to be, and what they were to be for, and the extent to which they might be imposed, are all clearly expressed in the treaty, to which resort must be had, rather than to the very general considerations put forth in the British Case, to determine whether it is permissible to make the privileges accorded on the non-treaty coasts "conditional upon the payment of light or harbor or other dues, or entering or reporting at custom houses or any similar conditions." The restrictions, and the only restrictions permissible, are such "as *may be necessary* to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

This restrictive clause is subject to a rule of construction which must not be lost sight of, and that is, that the express mention of one thing is the negation of all other things not mentioned. *Expressio unius est exclusio alterius*. So that when the negotiators agreed on and inserted in the treaty of 1818 an affirmative provision concerning the supervision which might be exercised over American fishing vessels resorting to the non-treaty coasts, they fixed by that provision the kind, character, and degree of supervision which was permissible, and negated every other kind, character, or degree of supervision.

This Tribunal must determine then, before it can give its sanction to the restrictions which Great Britain claims the right to make, that they are *necessary* to prevent the fishermen taking, drying or curing fish, or in any other manner whatever abusing the privileges reserved to them. They must also determine with reference to any particular character of restriction, whether it is of a kind to nullify or make valueless or unduly impair the privilege reserved to the fishermen, because it is not to be assumed that the negotiators meant to give a worthless privilege. It is true that the restrictions con-

templated, which may be necessary to prevent abuses of the privileges reserved, may vary from time to time and place to place, but the question must always be whether they are *necessary* and whether the power of making them is carried to the extent of unduly restricting or burdening the privilege. Restrictions may become necessary upon the settlement of a bay or harbor not necessary before its settlement, and they may not be unduly burdensome in a harbor having a custom-house or customs officer, when they would be so in an unsettled and unfrequented bay or harbor. The requirement of a report of American fishing vessels, when visiting a bay or harbor where there are customs officers to whom a report may be made, or other officials authorized to receive such reports, might, under some circumstances, be considered a *necessary* restriction to prevent abuses of the privileges reserved to such vessels. Such a requirement in unsettled bays would not only be *unnecessary* but it would go far to nullify the privilege reserved. It can not be maintained that the reporting and entering at a distant custom-house can have any tendency to prevent fishing vessels from abusing the privileges of seeking shelter, repairing damages, obtaining water, and purchasing wood in unfrequented bays or harbors.

Passing now from the question of entering or reporting at custom-houses, how is it possible to claim that the payment of light, harbor, or other dues are *necessary* to prevent the taking, drying or curing of fish or otherwise abusing the privileges reserved? Such dues are confessedly laid as a tax on the vessels, and the United States insists that a tax on its fishing vessels, is not only unnecessary to prevent them abusing any privilege, but is directly and distinctly contrary to the purposes of the treaty. As the argument in the British Case concerning the imposition of light dues and other similar burdens proceeds largely on the assumption that American fishermen are benefited by light-houses and port conveniences, which is a consideration entirely outside of the scope of this Question, it is not deemed necessary to respond to it.

The United States submits that the negotiators of the treaty of 1818 had in mind no other subjection of American fishing vessels resorting to the bays or harbors of the non-treaty coast for the four purposes mentioned in the treaty, than that specifically mentioned, namely, subjection to such restrictions as might be *necessary to prevent the taking or drying or curing of fish or in any other manner abusing the treaty privileges.*

QUESTION FIVE.

From where must be measured the "three marine miles of any of the coasts, bays, creeks or harbours," referred to in the said article?

SCOPE AND MEANING OF THE QUESTION.

The renunciatory clause of the treaty of 1818 is to be construed in answering this Question.

And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's Dominions in America not included within the above mentioned limits; *Provided however*, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein or in any other manner whatever abusing the privileges hereby reserved to them.

The Case presented on behalf of the Government of Great Britain states "that the three marine miles specified in Article I must be measured in the case of unindented coasts from the shore line at low tide."^a

With that statement the United States agrees.

There remains to be determined what is the true interpretation of the provision, within three marine miles of any of the "bays, creeks or harbours of His Britannic Majesty's Dominions in America," used in connection with the provision, "on or within three marine miles of any of the coasts."

The Government of Great Britain in 1870 prepared an instruction, which was forwarded the governor-general of Canada and the British minister in Washington, relating to the construction of this clause:

When a bay is less than six miles broad, its waters are within the three mile limit, and therefore clearly within the meaning of the

^a British Case, 122.

treaty; but when it is more than that breadth, the question arises whether it is a bay of Her Britannic Majesty's Dominions.^a

The decision of this Question, in the view of the United States, necessitates the determination of the coasts referred to, and the extent prior to 1818 of the dominion of Great Britain, with the acquiescence of the United States, *in respect of the fisheries*, over the waters adjacent to the shores of its possessions in America, bordering the North Atlantic Ocean; or the extent of the territorial sea over which Great Britain exercised sovereignty, *in respect of the fisheries*, with the acquiescence of the United States.

Article I of the treaty of 1818 recites:

Whereas *differences* have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry and cure fish on certain coasts, bays, harbors and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have forever certain rights.

It is apparent that differences had arisen which the treaty intended to adjust. The true interpretation of the words of the treaty is connected inseparably with the antecedent facts disclosing these differences which existed, and with the practical difficulties which the treaty was intended to remove.

The orderly presentation of the facts and of the arguments therefrom bearing upon the true interpretation of this clause divides naturally under four heads:

1. What were the "differences" existing between the United States and Great Britain referred to in the treaty of 1818, and in what manner did the plenipotentiaries of the two powers compose them?

2. What meaning was given this clause contemporaneously with the signing of the treaty?

3. Do the actions of the two Governments during the years immediately following the signing of the treaty disclose the true interpretation?

4. What was the origin of the contention now advanced by the Government of Great Britain, and what has been the attitude of the United States and Great Britain with reference thereto?

The United States will not attempt in this printed argument to refer specifically to the large number of erroneous assertions of fact

^a U. S. Case, Appendix, 628.

in the presentation of the British contention as to this Question, but the facts, disclosed by the evidence, will be stated without in each instance calling attention to and correcting the errors of statement in the British Case and Counter Case.

THE "DIFFERENCES" REFERRED TO IN TREATY OF 1818, AND THE MANNER IN WHICH THEY WERE COMPOSED.

The "differences" arose primarily from the contention on the part of Great Britain with the close of the war of 1812, that the second clause of Article III of the treaty of 1783 was abrogated by the War of 1812, while the United States claimed for its inhabitants the enjoyment of all the rights and liberties confirmed by the entire Article.

This renunciatory clause is not found in the treaty of 1783. It was brought forward by the plenipotentiaries on behalf of the United States, and became a part of the treaty of 1818 when the "differences," which had arisen respecting the liberty claimed by the United States for its inhabitants under the treaty of 1783, were adjusted.

THE TREATY OF 1783.

The complete understanding of the "differences" to be adjusted manifestly requires an examination of the provisions of the treaty of 1783, and a consideration of the respective rights of the two nations under its provisions, and of the respective claims after the War of 1812.

In the negotiations for the preliminary treaty of 1782, to terminate the War for Independence, which finally became the definitive treaty of 1783, the American Commissioners proposed a series of articles, among which was:

Thirdly. That the subjects of His Britannic Majesty and people of the said United States shall continue to enjoy unmolested, the rights to take fish of every kind on the banks of Newfoundland, and other places where the inhabitants of both countries used formerly, to-wit: Before the last war between France and Britain, to fish and also to dry and cure the same at the accustomed places, whether belonging

to his said Majesty or to the United States; and His Britannic Majesty and the said United States will extend equal privileges and hospitality to each other's fishermen as to their own.^a

This article was agreed to *ad referendum* by the British Commissioner, but was not, however, approved by the British Government; and a new article subsequently agreed upon by the Commissioners of the two powers also proved unacceptable to the British Government.^b

A fresh proposal was at length delivered to the American Commissioners, in which Article III appeared in this form:

The citizens of the said United States shall have the liberty of taking fish of every kind on all the banks of Newfoundland, and also in the Gulf of St. Lawrence; and also to dry and cure their fish on the shores of the Isle of Sables and on the shores of any of the unsettled bays, harbors and creeks of the Magdalen Islands, in the Gulf of St. Lawrence, so long as such bays, harbors and creeks shall continue and remain unsettled; *on condition that the citizens of the said United States do not exercise the fishery but at the distance of three leagues from all the coast belonging to Great Britain*, as well as those of the continent as those of the islands situated in the Gulf of St. Lawrence. And as to what relates to the fishery on the coast of the island of Cape Breton out of the said gulf, the citizens of the said United States shall not be permitted to exercise the said fishery but *at the distance of fifteen leagues* from the coasts of the island of Cape Breton.^c

This proposal that "the citizens of the said United States do not exercise the fishery but at a distance of three leagues from all the coast belonging to Great Britain, as well those of the continent as those of the islands situated in the Gulf of St. Lawrence," and "but at a distance of fifteen leagues from the coasts of the island of Cape Breton," proved entirely unacceptable to the American Commissioners, who refused to consider any such limitations. The proposal was thereupon abandoned by the Commissioner for Great Britain, who reported to his Government, after the conclusion of the negotiations:

If we had not given way in the article of the fishery, we should have had no treaty at all, Mr. Adams having declared that he would never put his hand to any treaty, if the restraints regarding the three leagues and fifteen leagues were not dispensed with, as well as that denying his countrymen the privilege of drying fish on the unsettled parts of Nova Scotia.^d

Article III of the treaty was finally agreed upon as proposed by the American Commissioners with slight amendments by the British Commissioner.

^a U. S. Case, Appendix, 217.

^b U. S. Case, Appendix, 218.

^c U. S. Case, Appendix, 219.

^d U. S. Case, Appendix, 234.

It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island) and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors and creeks of Nova Scotia, Magdalen Islands and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlements, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.^a

Therefore, in these first negotiations and the subsequent treaty between the people of the United States and Great Britain, all broad claims to extensive jurisdiction in respect of the fisheries over the waters adjoining the coasts of His Majesty's dominions in North America were abandoned by the Government of Great Britain with the recognition of the independence of the United States.

The people of the United States were henceforth to enjoy the fisheries in common with the subjects of Great Britain along the coasts and in the bays and creeks of all the British possessions in North America.

This article is clear in meaning. What the people of the independent colonies had theretofore enjoyed they were to continue to enjoy. The colonists had fought for, and used these fisheries. They were demanded in the partition of empire upon their independence and became a part of their domain. The possession of these fisheries was the moving cause of the early conflicts with the French in America.

At the beginning of the year 1776 Great Britain possessed seventeen colonies upon the North American continent. The time had come when they must decide upon a permanent form of government. The thirteen southern colonies chose independence, and on July 4th, 1776, published their Declaration of Independence.

The four northern colonies, Quebec, Nova Scotia, St. John's Island, and Newfoundland, chose to remain a part of the British Empire.

In 1782 the independence of the thirteen colonies was recognized

^a U. S. Case, Appendix, 24.

by Great Britain, and this treaty of peace was concluded which comprehended as one of its articles this fisheries article.

John Adams wrote in 1822:

That New England and especially Massachusetts had done more in defence of the fisheries than all the rest of the British Empire. That the various projected expeditions to Canada, the conquest of Louisbourg in 1745 and the subsequent conquest of Nova Scotia, in which New England had expended more blood and treasure than all the rest of the British Empire, were principally effected with a special view to the security and protection of the fisheries.

No claim of jurisdiction over the large bodies of water adjacent to the shores of the British possessions bordering the North Atlantic was made by the Government of Great Britain against the fishing vessels of the United States. It is on the contrary, quite apparent that no exclusive jurisdiction could be asserted on the one part, or acquiesced in on the other, for it is undeniable that from 1783 until the close of the War of 1812 the inhabitants of the United States enjoyed and exercised the fishery on all the coasts and in all the bays, creeks and harbors of the North Atlantic Ocean resorted to by British fishermen.

Upon the termination of the War of 1812, there was a divergence in the views of the two powers as to the liberty of the people of the United States under the second clause of Article III of the treaty of 1783. From this divergence in views arose the "differences" which the negotiators in 1818 undertook to compose.

The discussions and notes between the two Governments preliminary to the meeting of the negotiators in 1818 had disclosed very clearly, as will subsequently appear in this argument, that the sole question to be composed between the two powers was the liberty claimed by the people of the United States of fishing and of drying and curing fish within "the exclusive British jurisdiction." The right of fishing on the high seas was not in dispute. The two Governments had drawn a clearly defined distinction between the high seas and "the exclusive British jurisdiction."

After the termination of the War of 1812, by the signing of the treaty of Ghent in 1814, Lord Bathurst in the course of an interview with Mr. Adams, minister for the United States in Great Britain, in September, 1815, claiming that the treaty of 1783 had in part been abrogated by the War of 1812, stated:

Great Britain could not permit the vessels of the United States to fish *within the creeks and close upon the shores of the British terri-*

terries, so on the other hand it was by no means her intention to interrupt them in fishing anywhere in the *open sea*, or *without the territorial jurisdiction*, a *marine league from the shore*, and, therefore, that the warning given at the place stated, in the case referred to, was altogether unauthorized.^a

Mr. Adams had stated during this interview, that it was his intention to address a note to Lord Bathurst on the subject, and accordingly wrote:

Your lordship did also express it as the intention of the British Government to exclude the fishing vessels of the United States hereafter from the liberty of fishing *within one marine league of the shores of all the British territories in North America*.^b

Lord Bathurst also stated in a note to Mr. Adams in October, 1816:

It was not of fair competition that His Majesty's Government had reason to complain, but of the preoccupation of British *harbors and creeks* in North America by the fishing vessels of the United States.^c

Mr. Bagot, minister for Great Britain at Washington, in a note to Mr. Monroe, Secretary of State, in November, 1816, wrote:

It is not necessary for me to advert to the discussion which has taken place between Earl Bathurst and Mr. Adams. In the correspondence which has passed between them you will have already seen in the notes of the former a full exposition of the grounds upon which the liberty of drying and fishing *within the British limits* as granted to the citizens of the United States by the treaty of 1783 was considered to have ceased with the war, and not to have been revived by the late treaty of peace.^d

And again, after designating portions of the coast to which access would be allowed:

It being distinctly agreed that the fishermen should confine themselves to the unsettled parts of the coast, and that all pretensions to fish or dry within the *maritime limits* or on any other of the coasts of British North America should be abandoned.^e

Lord Castlereagh, His Majesty's principal secretary of state for foreign affairs, replied, May 17, 1817, to a note from Mr. Adams:

As soon as the proposition which Mr. Bagot was authorized in July last to make to the Government of the United States for arranging the manner in which American citizens might be permitted to carry on the fisheries *within the British limits* had been by them declined.^f

Here is the measure of the British claim. Great Britain could not permit the vessels of the United States to fish within the creeks

^a British Case, Appendix, 65.

^b U. S. Case, Appendix, 269.

^c U. S. Case, Appendix, 278.

^d U. S. Case, Appendix, 290.

^e U. S. Case, Appendix, 290, 291.

^f U. S. Case, Appendix, 295.

and close upon the *shores* of her possessions, nor would she prevent fishing beyond a marine league from the *shores*.

The creeks and waters close upon the *shores* were within the territorial jurisdiction of Great Britain, and the sea a marine league from the *shores* was without the territorial jurisdiction of Great Britain.

"Within the British limits," lay the creeks and harbors close upon the *shores*; within the "maritime limits" lay the interdicted fishing grounds; beyond a marine league from the *shores* lay the open sea.

The War of 1812 is claimed by Great Britain to have abrogated the liberty of American fishermen within the "maritime limits" of Great Britain extending three marine miles from the *shores*, within which lay the harbors and creeks close upon the *shores* that henceforth were to be closed to American fishermen.

If the Government of Great Britain had intended to claim exclusive jurisdiction, in respect of the fisheries, over great bodies of water extending many miles from *shore*, would the claim have been advanced by the statement, that hereafter the vessels of the United States would not be permitted to fish within the creeks and close upon the *shores* of the British territories, and would not be prevented from fishing without the territorial jurisdiction a marine league from the *shores*?

When Lord Bathurst and Mr. Adams, Lord Castlereagh and Mr. Adams, Mr. Bagot, Mr. Monroe, and Mr. Rush as acting Secretary of State, and subsequently the negotiators of the treaty of 1818, used the terms "territorial jurisdiction," "exclusive jurisdiction of Great Britain," "maritime limits," "within the British limits," "within the limits of the British Sovereignty," and "His Britannic Majesty's Dominions in America," they referred to a jurisdiction over the territorial sea extending only three marine miles from the *shores* of His Majesty's possessions in North America, and comprehending only bays, creeks, and harbors found therein.

Lord Bathurst and Mr. Adams had, without controversy, understood that the territorial jurisdiction extended a marine league from the shore, within which lay the creeks and waters close upon the shores denied to the fishing vessels of the United States, as clearly disclosed by the notes, which, placed subsequently in the hands of the negotia-

tors in 1818, became the basis of the negotiations and virtually the measure of their respective powers.

Before the consideration of the negotiations in 1818 to compose the "differences" between the two nations, it is important to review the diplomatic history of the two powers, which is material to this Question, between the termination of the War for Independence in 1783, and the commencement of negotiations leading to the treaty of 1818, for the purpose of ascertaining how precise an understanding had actually been reached as to the limits of "the exclusive British jurisdiction," or "the limits of the British sovereignty," over the waters adjacent to the shores of His Majesty's possessions in North America. These terms were used in the negotiations leading to the treaty of 1818 with such definite meaning as to preclude any conclusion except that a perfect and complete understanding existed between the two Governments as to their exact meaning.

This review becomes the more important because of the erroneous conclusions in the Case of Great Britain drawn from incomplete data as to the extent of the "maritime limits" in respect of the fisheries in 1818.

A careful reading and consideration of these prior negotiations between the two Governments regarding the extent of maritime jurisdiction discloses that before the Treaty of Ghent, and antedating any discussion of the modification of the liberty of the people of the United States by reason of the War of 1812, it was well understood by the United States that Great Britain's claim of sovereignty over adjacent waters, or the territorial sea, in the North Atlantic was limited to three marine miles from the *shores*, comprehending only the bays and creeks therein contained.

**THE UNRATIFIED TREATY OF DECEMBER 31, 1806, AND ITS
BEARING UPON THE EXTENT OF MARITIME JURISDICTION.**

The treaty of November 17, 1794, between the United States and Great Britain, known as the Jay Treaty, expired by limitation, in accordance with its terms, with the exception of the first ten articles, and the twelfth, twelve years after the exchange of ratifications, October 28, 1795.

James Monroe and William Pinkney, Commissioners on behalf of the United States, and Lord Holland and Lord Auckland, Commissioners for Great Britain, met in London in 1806 to negotiate a new treaty of amity, commerce and navigation.

A treaty was concluded by these Commissioners December 31, 1806, but was rejected by the United States for the reason, as stated by Mr. Madison, then Secretary of State, in an instruction to the Commissioners, following the receipt of the treaty:

Without a provision against impressments, substantially such as is contemplated in your original instruction, no treaty is to be concluded.^a

Article 12 of this unratified treaty stipulated:

And whereas it is expedient to make *special provisions* respecting the maritime jurisdiction of the high contracting parties on the coast of their respective possessions in North America on account of peculiar circumstances belonging to those coasts, it is agreed that in all cases where one of the said High Contracting Parties shall be engaged in war, and the other shall be at peace, the belligerent power shall not stop, except for the purpose hereafter mentioned, the vessels of the neutral power, or the unarmed vessels of other nations, *within five marine miles from the shore* belonging to the said neutral power on the *American seas*.

Provided, That the said stipulation shall not take effect in favor of the ships of any nation or nations which shall not have agreed to respect the limits aforesaid, as the line of maritime jurisdiction of the said neutral state. And it is further stipulated, that if either of the High Contracting Parties shall be at war with any nation or nations which shall not have agreed to respect the said *special limit* or *line of maritime jurisdiction herein agreed upon*, such contracting party shall have the right to stop or search any vessel beyond the limit of a *cannon shot, or three marine miles* from the said coast of the neutral power, for the purpose of ascertaining the nation to which such vessel shall belong; and with respect to the ships and property of the nation or nations not having agreed to respect the aforesaid line of jurisdiction, the belligerent power shall exercise the same rights as if this article did not exist; and the several provisions stipulated by this article shall have full force and effect only during the continuance of the present treaty.^b

The last paragraph of Article 19 of the treaty provided:

Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within *cannon shot* of the coast, nor within the jurisdiction described in article 12, so long as the provisions of the said article shall be in force, by ships of war or others having commissions from any prince, republic, or state whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated shall use his utmost

^a U. S. Counter Case, Appendix, 100.

^b U. S. Counter Case, Appendix, 22.

endeavors to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.^a

In this proposed treaty, the Commissioners on the part of the two Governments formally recognized maritime jurisdiction to be limited to a cannon shot, or three marine miles from the *shore*, unless modified by convention or long continued usage; but considering it expedient to make special provisions respecting the maritime jurisdiction of the High Contracting Parties on the coasts of their respective possessions in North America on account of peculiar circumstances appertaining to those coasts, it was agreed that as between the two nations, the line of maritime jurisdiction in case of one country being engaged in war, and the other at peace, should extend "five marine miles from the *shore* belonging to the said neutral power on the American seas."

The Commissioners recognized that this was an extension of maritime jurisdiction, and in Article 19 of the treaty, agreed that neither nation would permit the ships or goods belonging to the subjects or citizens of the other to be taken within cannon shot of the coast, nor within the jurisdiction described in Article 12. In short it was agreed that the rule of international law, then recognized by the two powers, confined maritime jurisdiction to a cannon shot from the shore. The words, "coast" and "shore", were used in the treaty interchangeably; for in Article 19 it is provided that neither party would permit a seizure within cannon shot of the coast, nor within the jurisdiction described in Article 12, which was "within five marine miles from the *shore*."

The Secretary of State submitted a proposed article to be incorporated in the treaty, which is cited in the British Case^b without the important statement being made that the proposal was vigorously resisted and declined by Great Britain:

It is agreed that all armed vessels belonging to either of the parties engaged in war, shall be effectually restrained by positive orders and penal provision from seizing, searching or otherwise interrupting or disturbing vessels to whomsoever belonging, whether outward or inward bound, within the harbors or the chambers formed by headlands or anywhere at sea within the distance of four leagues from the shore, or from a right line from one headland to another.^c

^a U. S. Counter Case, Appendix, 25.

^b British Case, 86.

^c British Case, Appendix, 60.

The Secretary of State added in the note containing this proposal:

If the distance of four leagues cannot be obtained, *any distance not less than one sea league may be substituted in the article.* It will occur to you that the stipulation against the roving and hovering of armed ships on our coasts so as to endanger or alarm trading vessels would acquire importance as the space entitled to immunity shall be narrowed.^a

Lord Holland and Lord Auckland, the British Commissioners, November 14, 1806, prior to the signing of the treaty, wrote to Lord Howick for instructions concerning "the *extension of jurisdiction*" suggested by the American Commissioners:^b

If your Lordship should deem it expedient on other grounds to concede any extension of jurisdiction to the United States beyond that which their independence necessarily implies, the American Commissioners have more than once assured us that they are ready in the article itself to acknowledge it as an exception to the general rule arising from the particular circumstances of their situation and peculiar nature of their coast. We shall also observe that their utmost expectation after our conversation on the subject, is two marine leagues. * * *

We might, on the other hand, derive some little advantage from the claim it would justify of an extended jurisdiction and consequent protection of revenue and commerce on the coasts of our colonial possessions.

January 3, 1907, the Commissioners for the United States transmitted to the Secretary of State the treaty which they had concluded on the 31st day of December. In commenting upon Article 12, they wrote:

The twelfth article establishes the maritime jurisdiction of the United States to the distance of five marine miles from their coast in favor of their own vessels, and the unarmed vessels of all other powers who may acknowledge the same limit. *This Government [Great Britain] contended that three marine miles was the greatest extent to which the pretension could be carried by the law of nations, and resisted, at the instance of the admiralty and the law officers of the Crown, in Doctors Commons, the concession which was supposed to be made by this arrangement with great earnestness.* The ministry seemed to view our claim in the light of an innovation of dangerous tendency, whose admission, especially at the present time, might be deemed an act unworthy of the Government. * * * It is fair to presume that the sentiment of respect which Great Britain has shown by this measure for the United States, will be felt and observed in future by her squadrons and their conduct on our coast and in *our bays and harbors.* It is equally fair to presume that the example of consideration which it affords in their favor by a nation so vastly preponderant at sea, will be followed by other powers.^c

^a British Case, Appendix, 60.

^b British Case, Appendix, 61.

^c U. S. Counter Case, Appendix, 96.

The Secretary of State, Mr. Madison, instructed the American Commissioners, after the receipt of the treaty, that it was unsatisfactory, and "without a provision against impressments substantially such as is contemplated in your original instructions, no treaty is to be concluded."^a

In commenting upon the provisions of the proposed treaty, and when forwarding new instructions for a continuance of negotiations, Mr. Madison wrote the Commissioners:

Should all the other belligerent nations, contrary to probability, concur in the addition of two miles to our jurisdiction, this construction would still be applicable to their armed ships; those unarmed alone being within the additional immunity against British cruisers; and the armed as well as the unarmed ships of Great Britain being expressly within the additional responsibility of the United States.

And as to Article 12:

It is much regretted that a provision could not be obtained against the practice of British cruisers, in hovering and taking stations for the purpose of surprising the trade going in and out of our *harbors*; a practice which the British Government felt to be so injurious to the dignity and rights of that nation, at periods when it was neutral.

* * *

To secure the advantage promised by this article the right of search ought to be suppressed altogether, the additional space enjoying in this respect the same immunity as is allowed to the marine league. To this object the President wishes your endeavors to be directed.^a

Mr. Monroe, one of the Commissioners, writing to Mr. Madison, regarding Articles 12 and 19 of the proposed treaty, stated:

It is the sole object of the twelfth article to secure to the United States an accommodation by extending their jurisdiction on their coast, in what concerns themselves from three to five miles. The stipulation is unconditional as to them, but conditional as to other powers, dependent upon their acknowledging the same limit. *It is made reciprocal by being extended to the British Dominions northward of the United States*; a circumstance which merits attention as it precludes the idea that any other equivalent was expected or intended to be given for it. It would have been extended to the Dominions of Great Britain in Europe and elsewhere had the British Commissioners desired it; they declined it, from a fear that it might produce some innovation in the general doctrine of the law of nations on the subject. This is, I think, fairly to be inferred from the instrument itself.^b

It had been proposed on behalf of the United States that the harbors and the chambers formed by headlands should be free from seizures, searches, or interruptions by armed vessels.

^a U. S. Counter Case, Appendix, 100.

^b U. S. Counter Case, Appendix, 102.

The British Commissioners had referred to the space between headlands and to bays dependent on and belonging to adjoining territory.

But it is, however, to be observed that as a result of the negotiations, the sole concession obtained from the Government of Great Britain was:

The belligerent power shall not stop, except for the purpose hereafter mentioned, the vessels of the neutral power or the unarmed vessels of other nations within five marine miles from the *shore* belonging to the said neutral power on American seas.

The British Commissioners finally yielded and agreed to an additional two marine miles to the admitted jurisdiction.

This treaty of 1806 was not ratified because of the inability of the Commissioners to agree upon an article satisfactory to the United States against impressments.

The provisions of the Jay Treaty relative to the question now under discussion expired, as has been shown, by limitation October, 1807.

There was no extension of jurisdiction by treaty, and the negotiations between the two powers clearly disclose that the extent of maritime jurisdiction recognized by the Government of Great Britain, in the absence of treaty stipulations or acquiescence in long continued usage, was three marine miles from the shores. There was no general recognition of jurisdiction over great seas whenever called bays, and any special provision for the protection of harbors was resisted by Great Britain.

The Government of Great Britain refused to include any additional provision enlarging the jurisdiction of the United States for the purpose of preventing impressments, and the Secretary of State returned the draft of the treaty to the American Commissioners with the instruction that "without a provision against impressments, substantially such as is contemplated in your original instructions, no treaty is to be concluded."

The failure of the Commissioners to agree upon an adjustment of the vexatious question of impressment left unsettled the difficulties which unhappily provoked the War of 1812.

It will be remembered that Great Britain throughout this period, and for some years afterward, was engaged in a war against France and her allies. It will be instructive to recall the nature of the activities of Great Britain that at length led the Congress in June, 1812, to declare war against Great Britain.

THE WAR OF 1812—ORIGIN OF THE DIFFERENCES COMPOSED BY
THE TREATY OF 1818.

James Madison, President of the United States, on June 1, 1812, transmitted confidentially to the Congress of the United States a message intended to place before the Congress the posture of the relations with Great Britain:^a

War was declared by Congress, and on the 19th day of June, 1812, President Madison in a proclamation announced the fact that war existed.

In 1814 Great Britain was finally at peace with Europe.

British and American Commissioners met at Ghent in August, 1814, for the negotiation of terms of peace.

At the first conference the British Commissioners requested information as to whether the American Commissioners were instructed to enter into negotiations on certain specified points:

But before they desired any answer they felt it right to communicate the intentions of their Government as to the North American *fisheries*, viz: that the British Government did not intend to grant to the United States gratuitously the privileges formerly granted by treaty to them *of fishing within the limits of the British sovereignty*, and of using the shores of the British territories for purposes connected with the fisheries.^b

At the threshold of these negotiations for peace, the question with regard to the fisheries article of the treaty of 1783 was raised. The position of the Government of Great Britain was that they did not intend, unless a consideration was inserted in the treaty, to permit the inhabitants of the United States to enjoy the liberty previously confirmed and granted "within the limits of the British sovereignty."

During the negotiation of the unratified treaty of 1806, the limits of sovereignty had been clearly stated and throughout these negotiations for the treaty of Ghent and during all subsequent negotiations prior to the treaty of 1818, this term, "within the limits of the British sovereignty," was used with its true signification in mind.

At a conference of the Commissioners, December 10, 1814, the British negotiators proposed to submit the question of the fisheries and of the navigation of the Mississippi to a future negotiation, and suggested a basis for such negotiations.^c

^a U. S. Counter Case, Appendix, 616.

^b U. S. Case, 14; Appendix, 242.

^c U. S. Case, 19; Appendix, 254.

The American plenipotentiaries returned an answer to this proposition, submitted by the British plenipotentiaries, in a note dated December 14, 1814, and "expressed their willingness to omit the article altogether."^a

In a note dated December 22, 1814, the British plenipotentiaries advised the American plenipotentiaries that they would agree to the proposal to omit altogether the article referring to the fisheries and the navigation of the Mississippi River.

The language of this note of the British plenipotentiaries is significant.

The undersigned, returning to the declaration made by them at the conference of the 8th of August that the privileges of fishing *within the limits of the British sovereignty*, and of using the British territories for purposes connected with the fisheries were what Great Britain did not intend to grant without equivalent, are not desirous of introducing any article upon the subject. With a view of removing what they consider as the only objection to the immediate conclusion of the treaty, the undersigned agree to adopt the proposal made by the American plenipotentiaries at the conference on the first instant, and repeating in their last note of omitting the eighth article altogether.^b

Therefore, negotiations on this subject were at an end. No reference was made, in the treaty subsequently agreed upon, to the right to navigate the Mississippi or to the fisheries.

December 24, 1814, the Treaty of Ghent was signed.

The report of the American Commissioners to Mr. Monroe, Secretary of State, was forwarded December 25, 1814. The Commissioners reported to their Government the grounds of their refusal to agree to the article referring to future negotiations, access to and navigation of the Mississippi River, and the liberty to fish "*within the exclusive jurisdiction of Great Britain.*"^c

This inability to adjust these "differences" at length led to the negotiations resulting in the treaty of 1818.

It is of the greatest importance that it be clearly understood that the "differences" remaining unadjusted in so far as they appertained to the fisheries were as to whether or not a new stipulation "was necessary to secure to the people of the United States the liberty to fish and to dry and cure fish *within the exclusive jurisdiction of Great Britain.*"

^a U. S. Case, 19; Appendix, 255.

^b U. S. Case, 20; Appendix, 256.

^c U. S. Case, 21; Appendix, 258.

In these negotiations, the United States claimed the rights and liberties, in respect of the fisheries, enjoyed before and since its independence.

Great Britain, on the other hand, claimed that the people of the United States had no right or liberty in the fisheries "within the exclusive jurisdiction of Great Britain."

There was no claim of jurisdiction advanced by Great Britain over bays, creeks, or harbors, except as contained within the exclusive jurisdiction of three marine miles from the shores. Throughout these negotiations there is no evidence anywhere of any claim of extended jurisdiction over great outer bays, and, therefore, no evidence of acquiescence by the United States in any assertion of such jurisdiction.

The fishermen of the United States had for generations resorted to these bays. If there had been any assertion of exclusive jurisdiction over large outer bays, the United States would certainly have opposed it, and have refused to acquiesce in any such claim. The failure to secure any extended jurisdiction in the negotiation in 1806 was fresh in the mind of Mr. Monroe, then Secretary of State, who was one of the Commissioners in that negotiation.^a

THE NEGOTIATIONS PRECEDING THE MEETING OF THE COMMISSIONERS IN 1818.

The "differences," which remained unadjusted between the United States and Great Britain at the close of the negotiations at Ghent, arose, as has been shown, from the contention on the part of Great Britain that the second clause of Article III of the treaty of 1783 was abrogated by the War of 1812, while the United States maintained that no part of the fishery provisions of the treaty of 1783 was abrogated by that war.^b

Great Britain denied the right of the people of the United States to fish "*within the limits of the British Sovereignty*, and to use the shores of the British Territories for purposes connected with the fisheries."^c

^a U. S. Counter Case, Appendix, 96.

^b U. S. Case, 26; Appendix, 24.

^c U. S. Case, Appendix, 242.

The United States claimed this right for its people "*within the limits of the British Sovereignty*," under the second clause of Article III of the treaty of 1783.

This divergence in the views of the two powers constituted the "differences" which had arisen, and which the negotiators in 1818 undertook to compose. The sole question to be adjusted was the liberty of fishing and drying and curing fish "within the exclusive jurisdiction of Great Britain."

There was not any difference regarding the extent of the exclusive jurisdiction of Great Britain. The negotiations of 1806 disclosed the position of Great Britain in that respect.

The Treaty of Ghent was signed December 24, 1814. In July of the following year, Mr. Monroe, who was Secretary of State during the negotiations at Ghent, and who had continued in office, advised Mr. Baker, the British chargé d'affaires at Washington, that a vessel of the United States engaged in the fishery "was warned off by the commander of the British sloop of war 'Jaseur' and ordered not to approach within sixty miles of the coast" of the British possessions in the North Atlantic.^a

The Secretary of State at once took the matter up with John Quincy Adams, the American minister in Great Britain, who had been one of the negotiators of the Treaty of Ghent.^b

Mr. Baker replied to Mr. Monroe's note that—

This measure was, as you have justly presumed in your note, totally unauthorized by His Majesty's Government.^c

In the meantime, Mr. Adams in London took up the matters, referred to him by the Secretary of State, in an interview with Lord Bathurst. In a note September 19, 1815, he reported:

My first object in asking to see him had been to inquire whether he had received from Mr. Baker a communication of the correspondence between you and him, relative to the surrender of Michilimackinac; to the proceedings of Colonel Nichols in the southern part of the United States; and to the warning given by the captain of the British armed vessel "Jaseur" to certain American fishing vessels, to withdraw from the fishing grounds to the distance of sixty miles from the coast. He answered that he had received all these papers from Mr. Baker, about four days ago; that an answer with regard to the warning of the fishing vessels had immediately been sent; but on the other subjects, there had not been time to ex-

^a U. S. Case, 22; Appendix, 262.

^b U. S. Case, Appendix, 263.

^c U. S. Case, 23; Appendix, 264.

amine the papers, and prepare the answers. I asked him if he could, without inconvenience, state the substance of the answer that had been sent. *He said certainly, it had been that as, on the one hand, Great Britain could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories, so, on the other hand, it was by no means her intention to interrupt them in fishing anywhere in the open sea, or without the territorial jurisdiction, of a marine league from the shore; and, therefore, that the warning given at the place stated, in the case referred to, was altogether unauthorized.* I replied, that the particular act of the British commander in this instance, being disavowed, I trusted that the British Government, before adopting any final determination upon the subject, would estimate in candor, and in that spirit of amity which my own Government was anxiously desirous of maintaining in our relations with this country, the considerations which I was instructed to present in support of the right of the people of the United States to fish on the whole coast of North America, which they have uniformly enjoyed from the first settlement of the country; that it was my intention to address in the course of a few days, a letter to him on the subject. *He said that they would give due attention to the letter that I should send him, but that Great Britain had explicitly manifested her intention concerning it; that this subject, as I doubtless knew, had excited a great deal of feeling in this country, perhaps much more than its importance deserved; but their own fishermen considered it as an excessive hardship to be supplanted by American fishermen, even upon the very shores of the British Dominions. I said * * * the question of right had not been discussed at the negotiation of Ghent. The British plenipotentiaries had given a notice that the British Government did not intend hereafter to grant to the people of the United States the right to fish and to cure and dry fish within the exclusive British jurisdiction in America, without an equivalent, as it had been granted by the Treaty of Peace in 1783. * * ** It was not so much the fishing, as the drying and curing on the shores that had been followed by bad consequences. It happened that our fishermen, by their proximity, could get to the fishing stations sooner in the season than the British, who were obliged to go from Europe, and who, upon arriving there, found all the best fishing places and drying and curing places pre-occupied. This had often given rise to disputes and quarrels between them, which in some instances had proceeded even to blows. It had disturbed the peace among the inhabitants on the shores; and, for several years before the war, complaints to this Government had been so great and so frequent that it had been impossible not to pay regard to them.^a

If the Government of Great Britain had intended to claim exclusive jurisdiction in respect of the fisheries over great bodies of water extending many miles from shore, would the claim have been advanced in the statement, that hereafter the vessels of the United States would not be permitted to fish within the creeks and close

^a U. S. Case, Appendix, 265.

upon the *shores* of the British territories, and would not be prevented from fishing beyond the territorial jurisdiction a marine league from the *shore*?

Mr. Adams wrote Lord Bathurst on the subject of the interview, September 25, 1815:

But in disavowing the particular act of the officer who had presumed to forbid American fishing vessels from approaching within sixty miles of the American coast, and in assuring me that it had been the intention of this Government and the instructions given by your lordship, not even to deprive the American fishermen of any of their accustomed liberties during the present year, *your lordship did also express it as the intention of the British Government to exclude the fishing vessels of the United States hereafter, from the liberty of fishing within one marine league of the shores of all the British territories in North America and from that of drying and curing their fish on the unsettled parts of those territories, and with the consent of the inhabitants on those parts which have become settled since the peace of 1783.*^a

Mr. Adams observed that a stipulation was inserted in the treaty of 1783—

declaring that they [the people of the United States] should continue to enjoy the right of fishing on the Grand Bank and other *places of common jurisdiction*, and have the liberty of fishing and of drying and curing their fish within the exclusive British jurisdiction on the North American coasts, to which they had been accustomed while themselves formed a part of the British nation.^b

Mr. Adams reminded Lord Bathurst that in the negotiations at Ghent, in which he had participated, the British plenipotentiaries had communicated to those of the United States their intentions as to the North American fisheries, as follows:

That the British Government did not intend to grant to the United States, gratuitously, the privileges formerly granted by treaty to them of fishing *within the limits of the British sovereignty*, and of using the shores of the British territories for purposes connected with the British fisheries.^c

Mr. Adams distinctly stated in his note to Lord Bathurst, “your Lordship did also express it as the intention of the British Government to exclude the fishing vessels of the United States hereafter from the liberty of fishing *within one marine league of the shores of all British territories in North America.*”

^a U. S. Case, 25; Appendix, 268-269.

^b U. S. Case, Appendix, 269-270.

^c U. S. Case, Appendix, 270.

Lord Bathurst answered Mr. Adams' note on October 30, and adopted his statement of the extent of British jurisdiction:

The undersigned, one of His Majesty's principal Secretaries of State, had the honor of receiving the letter of the minister of the United States, dated the 25th ultimo, containing the grounds upon which the United States conceive themselves, at the present time, entitled to prosecute their fisheries *within the limits of the British Sovereignty*, and to use British territories for purposes connected with the fisheries.^a

Here was a formal, definite, and distinct understanding between these representatives of the two powers as to what constituted "the limits of the British sovereignty," or "His Britannic Majesty's Dominions in America;" and throughout the negotiations thereafter, it was ever in the minds of the representatives of both powers that the "British jurisdiction" in America or "His Majesty's Dominion" was without question acknowledged to be limited, in respect of the fisheries, to one marine league from the *shores* of the British possessions in North America, within which lay the bays, creeks, harbors, and waters close upon the shores now denied to the vessels of the United States. This admission of the limitation of British jurisdiction necessarily implied that beyond such limit no right to exercise sovereignty was claimed as against the rights and liberty of the people of the United States in respect of the fisheries.

Lord Bathurst further stated in his reply to Mr. Adams' note that—

the Minister of the United States appears by his letter to be well aware that Great Britain has always considered the liberty formerly enjoyed by the United States of fishing *within British limits* and *using British territory* as derived from the Third Article of the Treaty of 1783, and from that alone; and that the claim of an independent state *to occupy and use at its discretion any portion of the territory of another* without compensation or corresponding indulgence can not rest on any other foundation than conventional stipulation.^b

Lord Bathurst here refers to "fishing within the British limits," and "using British Territory" as similar acts, and regarded both as the invasion of the territorial jurisdiction of Great Britain.

Lord Bathurst in this note, expressed a willingness to enter into negotiations for the modified renewal of the liberties in dispute.^c

^a U. S. Case, Appendix, 273.

^b U. S. Case, Appendix, 274.

^c U. S. Case, Appendix, 278.

The negotiations between Lord Bathurst and Mr. Adams have been reviewed *in extenso* for the reason that they furnish the foundation for the negotiations that ultimately resulted in the treaty of 1818. The notes between them were subsequently placed in the hands of the British and American negotiators, and were referred to as the measure of the respective admissions and contentions of the two powers.^a

Mr. Adams transmitted to the Secretary of State a copy of Lord Bathurst's note declaring a willingness to negotiate a modified renewal of the liberty and addressed a reply to Lord Castlereagh, His Majesty's principal secretary of state for foreign affairs.^b

Mr. Monroe, on February 27, 1816, acknowledged the receipt of the communication from Mr. Adams, enclosing a copy of Lord Bathurst's note of October 30, and authorized Mr. Adams "to negotiate a convention providing for the objects contemplated."

It appears by these communications that although the British Government denies our right of taking, curing and drying fish *within their jurisdiction* and on the coast of the British Provinces in North America, it is willing to secure to our citizens the liberty stipulated by the treaty of 1783 under such regulations as will secure the benefit to both parties, and will likewise prevent the smuggling of goods into the British Provinces by our vessels engaged in the fisheries.^c

Mr. Monroe had been one of the negotiators of the unratified treaty of 1806, and used the term, "*within their jurisdiction*," in its accepted meaning, and he was then familiar with Lord Bathurst's definition of British jurisdiction, for he had a copy of the note to Mr. Adams stating it; and he observed that Great Britain seemed willing to continue the liberty to fish within those waters.

In July, 1816, Mr. Monroe advised Mr. Adams that Mr. Bagot, who was in the United States as minister for Great Britain, had "received a power to arrange the difference respecting the taking and curing and drying fish on the shores of the British colonies, but whether it authorizes such an arrangement as will be useful and satisfactory to us, I am as yet uninformed."^d The negotiations of Mr. Adams in England were thus suspended while Mr. Bagot, under instructions from his Government, undertook to negotiate on the subject with the Secretary of State in Washington.^e

^a U. S. Case, Appendix, 304; British Case, Appendix, 85.

^b U. S. Case, Appendix, 278, 279, 283.

^c U. S. Case, 35; Appendix, 287.

^d U. S. Case, Appendix, 288.

^e U. S. Case, 36.

Mr. Bagot, as the basis of his instructions, had been furnished with the notes which had passed between Earl Bathurst and Mr. Adams, from which he would clearly understand, as Mr. Madison had understood, that the "British limits" comprehended only those bays, creeks, harbors, and waters lying close upon and within three marine miles from the shores of the British possessions.

The "differences", which Mr. Bagot was undertaking to adjust, consisted of a demand on the part of the United States for "adequate accommodation", both in point of *harbors* and drying ground on certain portions of the unsettled coast within the British sovereignty, on condition that it was distinctly agreed "that all pretensions to fish or dry within the *maritime limits* or on any other of the coasts of British North America should be abandoned."^a

The contention of Great Britain was that the fishermen of the United States should not be permitted to fish or dry within the "maritime limits" of Great Britain, which were understood to extend three marine miles from the shores, comprehending the harbors and waters lying close upon the shores, except along and upon those portions of the coasts to be designated and agreed upon. It is important that this position of Great Britain, as to what the United States should not be permitted to enjoy, be held in mind for it is not to be presumed that later the American Commissioners and the United States would voluntarily renounce rights, which Great Britain had never even intimated or suggested should be surrendered.

The negotiations between Mr. Bagot and Mr. Monroe failed of any satisfactory result, and Mr. Monroe advised Mr. Adams February, 1817:

I have the honor to forward to you, herewith, a copy of my correspondence with Mr. Bagot in relation to the fisheries on the coast of Labrador, etc., from which you will perceive that our negotiations on that interesting subject have not had the desired result. * * * In the meantime, he [the President] expects that no measures will be taken by the British Government to alter the existing state of things, and that it will be in your power to obtain a renewal of the order to the naval officers commanding on that station not to interrupt or disturb our fishermen during the approaching season.^b

Mr. Adams, in April, 1817, informed Lord Castlereagh that the negotiations in Washington had not been successful, but that it was

^a U. S. Case, 37; Appendix, 289-290.

^b U. S. Case, Appendix, 294.

the President's intention to renew the negotiation as soon as necessary information could be ascertained, and that in the meantime "he relied * * * that the order to the naval officer commanding on that station not to interrupt or disturb the American fishermen during the approaching season would be renewed."^a

Mr. Adams was assured that, in the expectation that a settlement would be effectuated, instructions would "expedite to the naval commanders on the American station to suspend the execution of the said orders during the approaching season."^b

While the controversy remained unsettled, twenty vessels sailing from various ports of the United States were captured within a British port by an armed barge from the British sloop-of-war *Dee*.^c

The Department of State protested against the seizures and represented that the United States Government expected redress, inasmuch as the vessels had entered the port in distress.

Mr. Bagot replied that, if the circumstances represented by the American Government proved to be correct, his Government would take measures for prompt redress of the injuries. He, however, enclosed a report from the captain of the *Dee*, together "with a copy of the orders under which he acted," and observed:

By these papers you will perceive that the vessels in question were in the habit of occupying and were, at the time of their seizure, actually occupying, for the purpose of their fishery, *the settled harbors of His Majesty's dominions*, in violation of the orders at all times enforced against all foreign vessels.^d

The orders enclosed, given to the captain of the *Dee* by Rear-Admiral Milne of His Majesty's Navy, contained these instructions:

On your meeting with any foreign vessel *fishing* or at anchor in any of the *harbors* or *creeks* in His Majesty's North American provinces, or within our maritime jurisdiction, you will seize and send such vessel so trespassing to Halifax for adjudication, unless it should clearly appear that they have been obliged to put in there in consequence of distress.^d

These seizures were made *within the three mile limit from shore*, and there was no claim of jurisdiction beyond such limit; and nothing appears in the orders of the Admiralty or in their execution to indicate any assertion of jurisdiction by Great Britain beyond such limit. The term, "within our jurisdiction," was construed by the Admiralty to mean within three marine miles of the shore, including,

^a U. S. Case, 44; Appendix, 294.

^b U. S. Case, 45; Appendix, 295.

^c U. S. Case, 42, 45; Appendix, 298.

^d U. S. Case, Appendix, 299.

of course, the harbors and creeks, contained within the three mile limit. There was no assertion of jurisdiction over the waters of the great outer bays, but only over the harbors and creeks lying close upon the shores within the three mile limit.^a

These vessels were all restored to their owners, the seizures being held illegal.^b

THE NEGOTIATIONS OF 1818.

July 3, 1815, Great Britain and the United States had concluded a commercial treaty which would expire by limitation four years from its date.^c

In May, 1818, John Quincy Adams, who had returned from England to be Secretary of State, instructed Mr. Rush, who had departed to England as minister for the United States, "the President desires you to propose an immediate general negotiation of a commercial treaty to embrace the continuance for a further term of years of the convention [of 1815] and also the other subjects in discussion between the two Governments, viz, the question concerning the slaves, *that relating to the fisheries*, the boundary from the Lake of the Woods, and the Columbia River settlement."^d

Great Britain willingly entered into the negotiation.

In July, 1818, the Secretary of State transmitted to Messrs. Gallatin and Rush, who had been appointed American Commissioners, the President's instructions for the conduct of the negotiation. As to the fisheries, these instructions were:

The proceedings, deliberations, and communications upon this subject, which took place at the negotiation of Ghent, will be fresh in the remembrance of Mr. Gallatin. *Mr. Rush possesses copies of the correspondence with the British Government relating to it after the conclusion of the peace, and of that which has passed here between Mr. Bagot and this Government.* Copies of several letters received by Members of Congress during the late session from the parts of the country most deeply interested in the fisheries are now transmitted.

The President authorizes you to agree to an article whereby the United States will desist from the liberty of fishing, and curing and drying fish *within the British jurisdiction generally*, upon condition

^a U. S. Case, 43, 47.

^b U. S. Case, Appendix, 308.

^c U. S. Case, 51.

^d U. S. Case, Appendix, 302.

that it shall be secured as a permanent right, not liable to be impaired by any future war, from Cape Ray to the Ramea Islands, and from Mount Joli, on the Labrador coast, through the Strait of Belle Isle, indefinitely north along the coast; the right to extend as well to curing and drying the fish as to fishing.^a

Mr. Rush, who as acting Secretary of State had conducted part of the correspondence with Mr. Bagot, was furnished with copies of all the correspondence with the British Government, including the notes exchanged between Lord Bathurst and Mr. Adams, when the latter was minister in Great Britain. In this correspondence the "differences" existing between the two Governments plainly appeared. This correspondence established that there was no controversy between the two Governments as to what waters were high seas and what waters were within the "maritime jurisdiction" of Great Britain or "within the British limits."

In these diplomatic notes, Great Britain had clearly defined the terms, "territorial jurisdiction," "maritime limits," "within the British limits," "within the limits of the British sovereignty," as including waters within three marine miles from the *shores* of the British possessions in North America. Throughout the negotiations no claim had ever been made to jurisdiction in respect of the fisheries over bodies of water of whatever character extending more than three marine miles from shore.

The British complaint emanating from Lord Bathurst was that the vessels of the United States could not be permitted "*to fish within the creeks and close upon the shores,*" and he stated they would not be interrupted "*in fishing anywhere in the open sea or without the territorial jurisdiction a marine league from the shore.*"^b

Mr. Adams' understanding of the British claim to exclusive jurisdiction, so plainly stated to him by Lord Bathurst, must have been in his mind when he drafted these instructions. There had been no controversy as to the extent of British jurisdiction. He was in accord with Great Britain as to the extent of the British dominion. The inhabitants of the United States would surrender all rights "within the British jurisdiction generally;" that is, within three marine miles of the shores of British territory, comprehending the waters lying close upon the shores denied American fishing vessels by Lord Bathurst, upon condition that the permanent right to fish, and to cure and dry

^a U. S. Case, 53; Appendix, 304.

^b U. S. Case, 24; Appendix, 256.

fish within "the British jurisdiction" from Cape Ray to the Ramea Islands on the Newfoundland shore, and from Mount Joli indefinitely north on the Labrador coast should be conceded.

Mr. Adams added in his instructions that, if the two powers were unable to agree upon a fair adjustment of their "differences"—

the British Government may as well be assured that not a particle of these rights will be finally yielded by the United States without a struggle which will cost Great Britain more than the worth of the prize.^a

The British and American plenipotentiaries first met in conference August 27, 1818, when—

it was agreed that the discussion should be carried on by conference and protocol with the insertion in the protocol of such written documents as either party might deem necessary for the purpose of recording their sentiments *in detail*.^b

In this first conference, the British plenipotentiaries expressed a willingness to sign at once a renewal of the commercial convention of 1815, as it existed, and the American plenipotentiaries in effect agreed to sign such a convention. The representatives of both powers agreed that the eventual signature of the instrument, renewing the commercial convention, would not be contingent upon a settlement of the other points in the negotiation.

At the third conference September 17, 1818, the American plenipotentiaries brought forward the first draft of Article I of the new treaty, containing among other provisions the renunciatory clause.^c

The language in the proposed article, "coasts, bays, creeks or harbours of His Britannic Majesty's Dominions in America" was gathered from the treaty of 1783. For thirty-five years after the treaty of peace, and throughout the negotiations for the new treaty, there had been no claim on the part of Great Britain that the "bays, harbours and creeks of His Britannic Majesty's Dominions in America" extended the jurisdiction of Great Britain beyond three marine miles from the shores. The "bays, creeks or harbours" referred to were necessarily those within "the British jurisdiction," within "the British limits," within "the exclusive jurisdiction of Great Britain," within "the maritime limits of Great Britain," within "the limits of the British sovereignty," and within its "dominion" of three marine miles from shore. These "bays, creeks or harbours," that is, those six marine miles or less in width

^a U. S. Case, Appendix, 305.

^c U. S. Case, 56; Appendix, 310.

^b U. S. Case, Appendix, 309.

at their entrances and all waters "close upon the shores" and within three marine miles of the shores, whether bays, creeks or harbors, were by common consent considered within the jurisdiction of Great Britain for they were admittedly within the understood "British limits."

At the conference, October 6, the British plenipotentiaries brought forward an article on the fisheries which the American plenipotentiaries declared was not acceptable.^a

Later an article, practically as first drafted by the American Commissioners including the renunciatory clause, was proposed by the British plenipotentiaries and on the 19th of October the article as it finally stood was agreed to and the treaty was concluded on the 20th day of October, 1818.^b

If this renunciatory clause, drafted by the American plenipotentiaries, had been made to read on or within three marine miles of any of the coasts, bays, creeks or harbors within the "British jurisdiction" or within "the British limits," or within "the exclusive jurisdiction of Great Britain," or within "the maritime limits of Great Britain," or within "the limits of the British sovereignty," the meaning definitely attached to any one of these terms in the notes and discussions between the two powers antedating the meeting of the Commissioners would have now attached when one of the phrases was again used.

It is not open to discussion that the words, "of His Britannic Majesty's Dominions in America," transferred from the treaty of 1783, were the equivalent in all material respects of these other limiting phrases.

The notes in the possession of the respective plenipotentiaries disclosed no demand for the surrender of the historic rights of the American fishermen in these great outer bays. There never had been any discussion, between the two powers, of such extended jurisdiction. The protocols of the conferences, in which the proceedings were to be recorded *in detail*, contain no reference to the discussion of this question, and the American plenipotentiaries stated that "their instructions did not anticipate that any new terms or restrictions would be annexed" to the proposals made to the American Government prior to the meeting of the negotiators.^c

^a U. S. Case, 57, 58; Appendix, 312, 314.

^b U. S. Case, 53, 59; Appendix, 317.

^c U. S. Case, 59; Appendix, 314.

The extent of the "bays, creeks, or harbours of His Britannic Majesty's Dominions in America" could not be determined except by the agreement of the two powers, provided there was to be any extension beyond the admitted jurisdiction within the three mile limit. There had been no claim of jurisdiction over the large outer bays on the part of Great Britain, and certainly no acquiescence by the United States in any broad claim of jurisdiction. On the contrary, it was, beyond any dispute, understood that the "bays, creeks, or harbours of His Britannic Majesty's Dominions in America" were those within the British limits, and, therefore, necessarily six marine miles or less in width; thus comprehending the waters close upon the shores sought to be closed against the vessels of the United States.

If the "British limits," or the "limits of the British jurisdiction," with absolutely no exception sought or asked for bays, extended three marine miles from the shores, in what manner could a bay, creek or harbor "of His Britannic Majesty's Dominions" include waters more than three marine miles from the shores?

A bay, creek, or harbor of His Britannic Majesty's dominions in America was, therefore, well understood to be a body of water not over six marine miles in width at its entrance. Such a bay, creek, or harbor was to be a closed bay; and the three marine miles were to be measured from the shores, and from the lines, determined by this measurement from the shores, across bays, creeks, or harbors within His Majesty's admitted jurisdiction.

There remains to be determined the "coasts" referred to in the renunciatory clause. The historical use of the word in the treaties, acts, orders, and regulations directly relating to this region is established by the collection, in this argument,^a of the uses made of the word.

Referring now to but one of the treaties in which the use of the word discloses its accepted meaning—the treaty between Great Britain and France of 1763, known as the Treaty of Paris, provided:

The subjects of France shall have the liberty of fishing and drying on a part of the *coasts* of the Island of Newfoundland, such as it is specified in article 13 of the Treaty of Utrecht, which article is renewed and confirmed by the present treaty (except what relates to the island of Cape Breton, as well as the other islands and *coasts* in the mouth and in the Gulph of St. Lawrence).^b

"Coast" here comprehended the sinuosities of the shore of that portion of Newfoundland referred to, and such was the construction

^a *Infra*, pages 237 et seq.

^b U. S. Case, Appendix, 52.

adopted in practice between the two nations; and the word "coasts" clearly included the sinuosities of the shore of the Gulf of St. Lawrence and signified its curving shore line.

So in the other treaties, acts, and documents collected, the word "coasts" refers to the coast line, comprehending the sinuosities of the shore. Nor was any different meaning given to the word by the lexicographers of the period, whose definitions are also gathered ^a in this argument.

The word signified "the edge of the land next the sea, the shore."

The word "shore" in turn was defined: "The coast of the sea."^b

The history of the negotiations has shown that the interdicted waters lay within three marine miles of the shores and necessarily comprehended bays, creeks, or harbors lying within the "maritime limits" and within "the exclusive British jurisdiction."

When, therefore, the American plenipotentiaries drafted this renunciatory clause, and subsequently, when the plenipotentiaries of both powers agreed upon its terms, they provided that the inhabitants of the United States should renounce any liberty previously enjoyed of taking, drying, and curing fish on or within three marine miles of *all* the coasts, *except* the sections of 'coast, which previously had been specifically designated. The word "coasts" comprehended the coast line of all the great bays; and, of course, the three miles could not be measured from the inner coast line of bays, creeks, or harbors six marine miles or less in width, for the three-mile line drawn across their entrances from the opposite shores closed such bays, irrespective of their inner extent. The three-mile-from-land rule of measurement excluded the fishing vessels from such bays, creeks, or harbors, as it would be impossible to enter them without passing through waters within three marine miles of the coast at the entrances. Such bays, creeks, or harbors, necessarily lying landward of the three-mile line, were "bays, creeks, or harbors of His Britannic Majesty's Dominions in America;" and as to them the plenipotentiaries provided a simple rule of thumb for the guidance of American fishing vessels.

A line following the sinuosities of the coasts at a distance of three marine miles seaward would not enter bays, creeks, or harbors six marine miles or less in width at their entrances—that is, bays, creeks, or harbors "within the exclusive British jurisdiction;" and therefore

^a *Infra*, page 241.

^b *Infra*, page 242.

the three-mile line was to be drawn seaward from such waters as though the shore-line continued across their entrances. So the clause was stated: "On or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominions in America."

There was, it was seen, no practical difference between the rule of three marine miles from the coasts—that is, land—and three marine miles from the coasts, bays, creeks, or harbors determined by the three marine miles measured from land. The area of water involved was too small to be regarded, and when the words in the proposal were gathered from the treaty of 1783 a simple form of expression was used. The important fact was that thereafter the fishing vessels of the United States should not approach, for the purpose of fishing, nearer than three miles to land, and the bays lying landward of the three-mile line following the sinuosities of the shore, were regarded as territorial, and the lines closing them as a continuation of the shore-line.

So the treaty was understood at the time of its making, as will presently be disclosed, and so it was construed without discussion for nearly a quarter of a century.

The occupation and use of these bays, creeks, or harbors, lying within the "British limits"—that is, landward of the three-mile line—and therefore within "His Britannic Majesty's Dominions in America" where settlements had been made, had been one of the subjects of complaint. The proviso clause, following the renunciatory clause, prescribed the terms upon which, so far as this treaty was concerned, the fishing vessels of the United States were thereafter to enter them.

Provided, however, That the American fishermen shall be admitted to enter *such* bays or harbors for the purpose of shelter and of repairing damages therein, or purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges hereby reserved to them.

These small bays, creeks, or harbors furnished natural shelter, and opportunity to procure wood and water and to make repairs.

The futility of the effort in the British Counter Case to show that the United States has changed its position on this subject is too apparent to necessitate an extended reply. The important matter under discussion is the right, under the terms of this treaty, of American fishing vessels to enter the great bays and to fish therein, so long

as they do not approach nearer than three marine miles to the shores. With this fact in mind, the position of the United States is entirely clear. The bays within the three-mile limit are bays of "His Britannic Majesty's Dominions," and the line drawn across the entrances to such bays is for the purposes of measurement considered as the shore line.

THE MEANING GIVEN TO THE WORDS OF THIS CLAUSE CONTEMPORANEOUSLY WITH THE SIGNING OF THE TREATY.

The American plenipotentiaries transmitted the treaty, together with "some observations on the several objects embraced" by it, on the day that the treaty was concluded.^a The report of their negotiations was forwarded to John Quincy Adams, Secretary of State, who was more familiar with the subject of the fisheries than any man in the public life of America. It will be recalled that he had instructed the plenipotentiaries on behalf of the President "to agree to an article whereby the United States will desist from the liberty of fishing and curing and drying fish *within the British jurisdiction generally*, upon condition that it shall be secured as a permanent right" on certain designated coasts; and that he had taken occasion to state "the British Government may be well assured that not a particle of these rights will be finally yielded by the United States without a struggle which will cost Great Britain more than the worth of the prize."^b An examination of contemporaneous documents shows that Mr. Adams received the treaty and the report of the plenipotentiaries, and that without any comment the treaty was forwarded by the President of the United States December 29, 1818, to the Senate for its consent and approval.

If it had been understood by the Government of the United States and by the people of the United States that by this treaty access to the great bodies of water along the coasts of the British possessions in the North Atlantic had been closed to the inhabitants of the United States, would such a surrender of historic rights have been made without any attempt, on the part of the United States, to obtain from Great Britain a recognition in broad terms of a similar jurisdiction over the waters adjacent to the coasts of its possessions on the

^a U. S. Case, 54; Appendix, 306.

^b U. S. Case, Appendix, 304.

Atlantic Ocean? It will be recalled and held in mind that, in the negotiations for the unratified treaty of 1806, the United States had endeavored to extend its jurisdiction in respect of a subject-matter more readily conceded, that is, the movements and operations of ships of war, and had been unable to obtain any concession greater than an additional two marine miles from its shores; and that Mr. Madison, then Secretary of State, and at this time President of the United States, had been anxious to secure a provision which would prevent the invasion of "the harbours or the chambers formed by headlands" of the United States by the war-ships of Great Britain, but had failed.

THE REPORT OF THE AMERICAN COMMISSIONERS IN 1818.

The American plenipotentiaries in their report, dated October 20, 1818, transmitting the treaty, observed as to the fisheries:

We succeeded in securing, besides the rights of taking and curing fish within the limits designated by our instructions, as a *sine qua non*, the liberty of fishing on the coasts of the Magdalen Islands, and of the western coast of Newfoundland, and the privilege of entering for shelter, wood, and water, in all the British *harbours* of North America. Both were suggested as important to our fishermen, in the communications on that subject which were transmitted to us with our instructions. To the exception of the exclusive rights of the Hudson's Bay Company we did not object, as it was virtually implied in the treaty of 1783, and we had never, any more than the British subjects, enjoyed any right there; the charter of that company having been granted in the year 1670. *The exception applies only to the coasts and their harbours and does not affect the right of fishing in Hudson's Bay, beyond three miles from the shores, a right which could not exclusively belong to, or be granted by, any nation.* * * *

It will also be perceived that we insisted on the clause by which the United States renounce their right to the fisheries relinquished by the convention, that clause having been omitted in the first British counter-project. We insisted on it with a view—(1) of preventing any implication that the fisheries secured to us were a new grant, and of placing the permanence of the rights secured and of those renounced precisely on the same footing. (2) Of its being expressly stated that our renunciation extended only to the distance of three miles from the coasts. This last point was the more important, as with the exception of the fishery in open boats within certain harbors, it appeared, from the communications above mentioned, that the fishing-ground, on the whole coast of Nova Scotia, is more than three miles from the *shores*; whilst, on the contrary, it is almost universally close to the *shore* on the coasts of Labrador. It is in that

point of view that the privilege of entering the *ports* for shelter is useful, and it is hoped that, with that provision, a considerable portion of the actual fisheries on that coast [of Nova Scotia] will, notwithstanding the renunciation, be preserved.^a

It is worthy of note that in this report, drafted on the day that the treaty was signed, and with every detail of the negotiations in mind, the American plenipotentiaries referred to the waters covered by the renunciatory clause as “British *harbours* of North America;” and when referring to the exclusive rights of the Hudson’s Bay Company, stated that the exception of these rights “applies only to the *coasts and their harbours* and does not affect the right of fishing in Hudson’s Bay beyond three miles from the *shore*, a right which could not exclusively belong to or be granted by any nation.”^b

The treaty itself contained no differentiation between Hudson’s Bay and any other bay, for the language is “without prejudice however, to any of the exclusive rights of the Hudson’s Bay Company.” It was, therefore, clearly the belief of the American plenipotentiaries that in any bay, other than one within the British limits of three marine miles from shore, the inhabitants of the United States had the right of fishing “beyond three miles from the shores,” inasmuch as this was “a right which could not exclusively belong to or be granted by any nation.”

This observation by the American Commissioners establishes beyond peradventure that in the negotiations it was recognized by both powers that the “maritime limits of Great Britain” or the “Dominions of His Britannic Majesty” extended three marine miles from the *shores*, and comprehended only waters contained therein as had been previously understood between the two Governments.

The words of the report, “*the exception applies only to the coasts and their harbours*,” shed much light on the understanding of the negotiators. “Coasts and their harbors” were to be excepted from the rights of the American fishermen but beyond three miles from the “coasts and their harbours” American fishermen were not to be excluded because the rights in those waters could not exclusively belong to any nation.

These “coasts and their harbours” were within the greater bay—Hudson’s Bay. This is exactly the historic contention of the United States. The renunciatory clause does not refer to the great outer

^a U. S. Case, 54; Appendix, 306.

^b U. S. Case, 66; Appendix, 306.

bays, but to the small bays indenting the coasts and to the bays, harbors, and creeks indenting the coasts of the large outer bays. It was these bays which were suitable for shelter and within which wood could be purchased, water obtained, and repairs made.

The negotiators for the United States reported that they "insisted on the clause by which the United States renounce their right to the fisheries relinquished by the convention, that clause having been omitted in the first British counter project." And it will be further observed that this insistence was because, among other reasons, "of its being expressly stated that our renunciation extended only to the distance of three miles from the coasts. This last point was the more important, as with the exception of the fishery in open boats within certain harbours, it appeared from the communications above mentioned that the fishing ground on the whole coast of Nova Scotia is more than three miles from the *shores*; whilst on the contrary, it is almost universally close to the *shore* on the coasts of Labrador."

"The fishing ground on the whole coast of Nova Scotia is more than three miles from the shores." By this report the plenipotentiaries clearly establish that they understood the renunciatory clause to relate to waters within three miles from the shores, and that the word coast included the whole coast of Nova Scotia, comprehending the coast bordering the Bay of Fundy.

In the British Case^a the surprising statement is made that no one seemed to have conceived that the three mile limit should be measured from the shores until the cupidity of the fishermen of the United States was aroused by the mackerel fisheries. This statement is the more remarkable from the fact that this report of the plenipotentiaries of the United States, drafted on the day the treaty was signed, has been a public document known to the Government of Great Britain for more than three quarters of a century, and is printed in the Appendix to the British Case,^b while, on the other hand, the Government of Great Britain has never published in full the reports of their plenipotentiaries. It may be presumed, as elsewhere stated in this argument, that the reports of the British negotiators would at least not assist the British contention or weaken the position of the United States.^c

^a British Case, 83. ^b British Case, Appendix, 94. ^c U. S. Counter Case, 11.

Reverting to the report of the American plenipotentiaries, it is to be noted that they further advised the Secretary of State:

It is in that point of view that the privilege of entering the *ports* for shelter is useful, and it is hoped that with that provision a considerable portion of actual fisheries on that coast (of Nova Scotia) will not withstanding the renunciation, be preserved.^a

This observation concerned the clause of the treaty:

Provided, however, That the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever.

The American plenipotentiaries reported that the "privilege of entering the *ports* for shelter is useful."

The permission to enter *such* bays or harbors refers to the renounced bays or harbors within the three mile limit on the coasts not designated, that is, on the non-treaty coasts, and the American negotiators referred to the bays, harbors, and creeks as *ports*. This is an important contemporaneous construction of the character of the bays, creeks, or harbors referred to in the renunciatory clause.

Inasmuch as the complaint of Lord Bathurst to the Government of the United States was against the occupation of "British *harbours and creeks* in North America," and against fishing "within the creeks and close upon the shores of the British territories," and not against the use of the great outer bays of vast extent, the construction put upon these words by the American negotiators was in harmony with the position of the Government of Great Britain.

The American negotiators, understanding that the bays, creeks, or harbors renounced were only those contained within the three mile limit of the shores of the British possessions, referred to such waters as *ports* and hoped that the right of entering the ports for shelter, repairing damages, purchasing wood, or obtaining water would preserve a considerable portion of the fisheries along the coast of Nova Scotia. The coast of Nova Scotia included the shores bordering the large bays, as always understood, and the word had historically been so used. This right of shelter made fishing even at a distance of three marine miles from the shore possible, while if no right had been obtained to seek shelter, wood, water, and repairs, the danger of fishing along the coast without the three mile limit would have pre-

^a U. S. Case, Appendix, 306.

vented the fishermen of the United States from enjoying the fisheries except on the treaty coasts.

The very unreasonable suggestion had yet to be advanced that the bays or harbors, which American fishermen were privileged to enter for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, including such great bodies of water as the Bay of Fundy, Fortune Bay and Placentia Bay.

THE STATEMENTS OF RICHARD RUSH IN 1833 AND IN 1853.

Richard Rush remained for seven years after the conclusion of the treaty of 1818 as minister for the United States in England. During this period he was "engaged in extensive negotiations with England in 1823-24, which brought under consideration the whole relations, commercial and territorial between the two countries, including our entire intercourse by sea and land with her North American Colonies."^a

In 1833 he published at Philadelphia "Memoranda of a Residence at the Court of London." In this account of his life in England, published before Nova Scotia conceived the headland interpretation of the renunciatory clause, Mr. Rush, who had an opportunity to know, during a period of seven years, the interpretation put upon the clause by Great Britain, again recorded, before any discussion as to the true interpretation, his understanding exactly as reported to his Government in 1818.^b

In a letter written in July, 1853, to Mr. Marcy, then Secretary of State, Mr. Rush stated with reference to the treaty:

In signing it we believed that we retained the right of fishing in the sea, whether called a bay, gulf, or by whatever other term designated, that washed any part of the coasts of British North American provinces with the simple exception that we did not come within a marine league of the shore.

After quoting the renunciatory clause, he continued:

These are the decisive words in our favor. They meant no more than that our fishermen, whilst fishing in the waters of the Bay of Fundy, should not go nearer than three miles to any of those small inner bays, creeks, or harbors which are known to indent the coast of Nova Scotia and New Brunswick. To suppose they were bound

^a U. S. Case, Appendix, 555.

^b U. S. Case, Appendix, 323.

to keep three miles off from a line drawn from headland to headland on the extreme outside limits of that bay, a line which might measure fifty miles or more, according to the manner of drawing or imagining it, would be a most unreasonable and therefore unnatural supposition. I cannot think that it entered the minds of the British plenipotentiaries any more than ours. * * *

I remained minister at the court seven years after the signing of the convention. Opportunities of complaint were, therefore, never wanting. If intimated to me, it would have been my duty to transmit at once every such communication to our Government. Nor did I ever hear complaints through the British legation at Washington. It would have been natural to make objections when our misconstruction of the instrument was fresh if we did misconstrue it. The occasion would have been especially opportune when I was subsequently engaged in extensive negotiations with England in 1823-24 which brought under consideration the whole relations, commercial and territorial between the two countries, including our entire intercourse by sea and land with her North American colonies. Still silence was never broken in the metropolitan atmosphere of London whilst I remained there.^a

THE RENUNCIATORY CLAUSE INTERPRETED BY THE ACTIONS OF THE TWO GOVERNMENTS FOLLOWING THE TREATY.

The Case of the United States^b states:

During the eighteen years from 1818 to 1836, and, in fact, for several years thereafter, no question arose between Great Britain and the United States under this treaty involving the interpretation of the meaning of its provisions. * * * The only seizures of American vessels during this period were made between the years 1821 and 1824 for alleged violations of the provisions of this section of the act. It will be found upon an examination of the circumstances surrounding these seizures that in every instance they were made under the direction of British naval officers on the charge of fishing *within three miles of the shore* in waters wherein the liberty of fishing had been renounced by the treaty, or of being within three miles of the shore in such waters for purposes other than the four purposes of shelter, repairs, wood, and water provided for in the treaty.

It is unnecessary to discuss the evidence regarding these seizures which is fully reviewed in the Case of the United States.^c The evidence establishes beyond any possibility of successful dispute that

^a U. S. Case, Appendix, 554.

^b U. S. Case, 75-76.

^c U. S. Case, 75-81.

Great Britain did not question the right openly exercised by American fishermen of fishing within any of the large bays, provided fishing operations were not conducted within three miles of the *shores*.

That this was the position of Great Britain is shown by the orders, under which His Majesty's sloop *Dotterel*, then stationed on the North Atlantic coast, acted. Captain Hoare in a report to Rear-Admiral Lake, November 25, 1824, stated, in answer to a complaint of the owners of the American fishing vessel *Hero*, which had been seized in a harbor within the three mile limit, that:

My order to the officers of the boats has been that any American vessels they may find within *three marine miles of the shores*, except in evident cases of distress, or in want of wood or water, they are to detain and send or carry them to St. Andrews.^a

The American fishermen, as represented by a memorial of thirty-five merchants and ship-owners, residing at Eastport in the State of Maine, dated July 27, 1824, "were constantly fishing in the Bay of Fundy common to both countries," and objected to the actions of the *Dotterel*, "inasmuch as they (American fishermen) are deprived the privilege of making a *harbour* for the purpose of shelter and to purchase wood and procure water, it operates as a deprivation of a great and important benefit which they feel that they have a right to enjoy without interruption."^b

It is manifestly established that the American fishermen were fishing in great numbers in the Bay of Fundy, one of the large outer bays, and that the *Dotterel* was seizing American vessels whenever found within three marine miles of the *shore*, thus preventing the American vessels from seeking the small harbors along the coast for shelter from the violent storms of the Bay of Fundy.

The construction as to the large outer bays, always contended for by the United States, was being applied by the Government of Great Britain.

But, while the American fishermen were not molested in their operations within the great outer bays, they were not allowed to resort to the small bays, creeks, or harbors indenting the coast, "except in evident cases of distress or in want of wood or water."

It was natural that there should have arisen differences of opinion as to what constituted distress, and as to whether or not any par-

^a U. S. Case, 77; Appendix, 374-377.

^b U. S. Case, 76; Appendix, 335.

ticular vessel was in need of wood or water; but the great fact remains that by the instructions of the Government of Great Britain, the treaty was being construed, in so far as the great outer bays were concerned, in accordance with the interpretation of the United States, and not in accordance with the interpretation later originated by the authorities of Nova Scotia, and now contended for by Great Britain.

In reviewing the various seizures made between 1821 and 1824—and no seizures were made after 1824, prior to the passage of the Nova Scotia Hovering Act in 1836—the Case of the United States^a establishes, in respect of each seizure, that the claim was made on behalf of Great Britain that an offense had been committed within three marine miles of the shore and that no attempt was made prior to the appearance of the Nova Scotia theory of interpretation to prevent any American fishing vessel from fishing in the waters of any of the large outer bays so long as the vessel remained outside of the three-mile limit from the shores, or outside of bays, harbors, or creeks six miles or less in width at their mouths.

The Nova Scotia Hovering Act was adopted by the legislature of Nova Scotia, March 12, 1836.^b The period after the passage of this act requires separate consideration, as a new interpretation of the treaty was not many years after, strenuously urged by the authorities of Nova Scotia.

It is, however, clearly established by the instructions issued to the *Dotterel*, and by the actions of the Government of Great Britain, that from 1818 until 1836, covering a period of eighteen years, the practical construction put upon this renunciatory clause of the treaty was that American fishermen must desist from fishing within three miles of the shores of the great bays, and that no fishing vessel would be permitted to enter the small bays, six marine miles or less in width, indenting the coasts of Nova Scotia, including the coasts of the great bays, and the coasts of Cape Breton, unless it was clearly established that it had entered such bay, creek, or harbor for one of the four purposes specified in the treaty.

Solomon Thayer, a citizen of the United States, wrote in 1839 in a letter, which was eventually forwarded to the Secretary of State:

I have this morning been informed that some depredations have already been made upon Grand Menan by our fishing vessels that

^a U. S. Case, 77-82.

^b U. S. Case, Appendix, 119.

now number four or five hundred in the Bay of Fundy, and that a serious attack is in contemplation.^a

Numerous statements and references running through the mass of evidence found in the Appendix to the Case of the United States^b show beyond question that American fishing vessels resorted in great numbers to the Bay of Fundy, and other large outer bays for the purpose of prosecuting the fisheries.

An examination of this evidence, which includes some of the affidavits containing the grounds upon which the seizures were made,^c establishes that the sole ground for each seizure was that a fishing vessel of the United States had entered a port or harbor within three marine miles of the shores of the British possessions for some purpose other than the four specified in the renunciatory clause of the treaty.

THE ORIGIN AND COURSE OF THE CONTROVERSY AS TO "BAYS."

In 1839, Mr. Vail, acting Secretary of State, in obedience to a direction from the President of the United States, made a report on the conditions obtaining on the fishing grounds:

It does not appear that the stipulations in the article [Art. I of the treaty of 1818] above quoted *have since the date of the convention been the subject of conflicting questions of right between the two Governments.*^d

He then reviewed the various seizures of American fishing schooners and the ground for their seizure, and stated:

From these statements it will appear that the only cases of seizure of which anything is known at the department not being made on the coasts of Newfoundland or Labrador, occurred at places in which, under the convention of 1818, the United States had forever renounced the right of their vessels to take, dry and cure fish; retaining only the privilege of entering them for the purposes of shelter, repairs, purchasing wood and obtaining water, and no other. In the absence of information of a character sufficiently precise to ascertain either, on the one side, the real motives which carried the American

^a U. S. Case, Appendix, 426.

^b U. S. Case, Appendix, 325-406, 407-460, 1076-1078.

^c U. S. Case, Appendix, 433.

^d U. S. Case, Appendix, 436-440.

vessels into British *harbors*, or, on the other, the reasons which induced their seizure by British authorities, the department is unable to state whether, in the cases under consideration, there has been any flagrant infraction of the existing treaty stipulations. The presumption is, that if, on the part of the citizens of the United States, there has been a want of caution or care in the strict observance of those stipulations, there has been, on the other hand, an equal disregard of their spirit, and of the friendly relations which they were intended to promote and perpetuate, in the haste and indiscriminate rigor with which the British authorities have acted.^a

Whether the numerous seizures of American vessels were occasioned by the reckless disregard of their treaty rights in the small bays, ports, and harbors indenting the coast, or whether there was an arbitrary disregard of the treaty rights of the people of the United States by the authorities of Nova Scotia is at this time quite immaterial.

In any event, as a result of the conditions, the assembly of Nova Scotia had in 1836 memorialized His Majesty King William IV for assent to an act containing rules, regulations, and restrictions under which the fisheries should be conducted.^b

The act referred to in this memorial was passed March 12, 1836 (6 Wm. IV, chap. 8),^c and was put into effect by an order of council dated July 6, 1836.^d

There was nothing in the memorial of the assembly of Nova Scotia or in the act passed to indicate any new interpretation of the renunciatory clause of the treaty.

It will be observed by reading this memorial and act that the authority to make regulations was based upon the right found in the treaty to make "such restrictions as may be necessary to prevent their taking, drying or curing fish therein," that is, in the bays or harbors entered for the purpose of shelter, and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purposes whatever.

The legislature of Nova Scotia was making regulations for the purpose of more stringently regulating the resort of American fishing vessels to the small bays, ports, and harbors.

It is apparent that there was abundant opportunity for differences of opinion regarding the necessity of any particular American ves-

^a U. S. Case, 91; Appendix, 440.

^b U. S. Case, 82; Appendix, 1040-1042.

^c U. S. Case, 82-86; Appendix, 119.

^d U. S. Case, Appendix, 116.

sel resorting to a harbor for the purposes of shelter, repairing damages, purchasing wood or of obtaining water.

As observed by Mr. Vail in 1839, the stipulations of Article I of the treaty had not been the subject of conflicting questions of right between the two Governments; but the seizures by the Government of Nova Scotia of American vessels, resorting to ports and harbors and inner bays, had been frequent during the years now under consideration, while there is no evidence anywhere of any contention thus far on the part of the Province of Nova Scotia that the fishing vessels of the United States had no right to fish in the great outer bays.

The seizures between the years 1838 and 1840 have been reviewed at length in the Case of the United States; and it is there shown that the only seizures made during this period were for offenses alleged to have occurred *within three miles of the shore*.^a

This act of 1836 of the legislature of the Province of Nova Scotia contained these provisions after providing for condemnation:

The amount chargeable for the custody of said goods, ship, vessel, boat or any other thing so seized as aforesaid, shall be first deducted and paid, *and the residue divided into two equal moieties, one of which shall be paid to the officer or other person or persons legally seizing the same, without deduction*, and the other moiety to the government, and paid into the treasury of this Province, all costs incurred having been first deducted therefrom * * * *nor shall the person who made such seizure be liable to any action, indictment, or other suit or prosecution on account of such seizure*.^b

The inhabitants of Nova Scotia, as is most apparent from the trivial grounds for some of the seizures in these years, coveted the industry pursued by the people of the United States and commenced a systematic effort to nullify the treaty obligations of Great Britain.^c

It is here to be observed that, even after the passage of this act, which called for the strict enforcement of the rights of Great Britain against the American fishermen, the Government of Great Britain instructed Admiral Sir Thomas Harvey, representing the Admiralty of Great Britain in those waters, only to prevent American vessels from fishing within three miles of *land*.

Lieutenant Paine of the United States Navy was dispatched by the Secretary of the Navy in September, 1839, to the coasts of the British Provinces in obedience to directions of the President of the United

^a U. S. Case, 89-94.

^b U. S. Case, Appendix, 120.

^c U. S. Case, 95.

States.^a In a report, December 29, 1839, to the Secretary of State, he first made known to the United States the new theory of interpretation.

The authorities of Nova Scotia seem to claim a right to exclude Americans from all bays including those large seas such as the Bay of Fundy, and the Bay of Chaleurs, and also to draw a line from headland to headland, the Americans not to approach within three miles of this line.

The fishermen, on the contrary, believe they have a right to work anywhere, if not nearer than *three miles to the land*.

The orders of Admiral Sir Thomas Harvey, as he informed me, are only to prevent their fishing nearer than three miles.

According to this construction, Americans may fish in the Bay of Fundy, the Bay of Chaleurs, and the Bay of Miramichi; while their right would be doubtful in Chedabucto Bay, and they would be prohibited in the other bays of Nova Scotia.^b

The important fact is therefore established, that the orders to the Admiralty of Great Britain were to make no seizures nearer than three miles to *land*, and only to prevent fishing within the three mile limit, as previously understood between the United States and Great Britain.

Lieutenant Paine also reviewed the provisions of the Nova Scotia act of 1836, and observed:

The whole of this act, and the proceedings on the subject, as detailed in the journals of the assembly, display an unfriendly disposition towards Americans, or rather a determination to quarrel or drive them from the exercise of rights secured by solemn treaty.^c

In commenting upon the provisions of the act protecting the person seizing a vessel from damages, and dividing the prize between the person making the seizure and the Government, he stated:

The person who made the most of these seizures, (a Mr. Darby, who commands a chebacco boat, with ten or twelve men armed with muskets,) is prompted, as well by his interest as by a certainty of immunity, to seize all he can find.^d

All seizures made in the year 1840 were for offenses, however, claimed to have been committed *within three miles of land*.^e

Mr. Primrose, American consul at Pictou, Nova Scotia, in a despatch to the Secretary of State, November 25, 1840, made an extensive report on the situation:

I have just been able to procure a copy of the Journal, and Proceedings of the House of Assembly of this Province at its session 1839-40, and I beg leave to forward it to you herewith. * * *

^a U. S. Case, 95; Appendix, 442.

^b U. S. Case, Appendix, 451.

^c U. S. Case, Appendix, 453.

^d U. S. Case, 94.

The fact that American fishermen do frequently fish in prohibited waters will not now admit of a doubt; but it is equally certain, that under the present restrictive system of this Province, many of the innocent are frequently made to suffer, and are left without redress. On looking at the nature of the law and regulations under which seizures are made—the inducements to excite the cupidity of the seizers, and their almost entire irresponsibility, leave no room for astonishment at the above circumstances; but although Nova Scotia may by enactments shelter its officers from consequences, it cannot absolve its government from liability for injuries committed under cover of its authority.

The great evil arising out of almost indiscriminate seizure of American fishing craft on the coasts of the provinces, would probably be best checked by demand on the British Government for ample remuneration to all parties sustaining injury through the improper interference of the provincial authorities.^a

The British Case refers to an instruction of 6th October, 1838, from Lord Palmerston to Mr. Fox, British minister at Washington, founded upon, "An address of the legislative council and house of assembly of Nova Scotia."^b The instruction is again referred to in the British Counter Case.^c It should, however, not escape attention that there is no claim, either in the Case or Counter Case, that any communication in the terms of the instruction was made to the Government of the United States.

There was no communication with the United States on the subject of the instruction, which was either not forwarded, or recalled; and accordingly there is no evidence in the British Case or Counter Case of any report from Mr. Fox of any communication with the Government of the United States.

In any event this instruction to Mr. Fox to open negotiations was based upon an address of the Nova Scotia Assembly, and does not alter the fact that the theory originated with Nova Scotia.

The Department of State did not take up the question with the British Government until 1841, and the notes exchanged establish conclusively that there had been no previous discussion of the subject of the new interpretation of the treaty.

Mr. Forsyth, then Secretary of State, on 20th February, 1841, addressed a note to Mr. Stevenson, minister for the United States in Great Britain, instructing him to:

Immediately address a representation of the whole subject to Her Majesty's Government; earnestly remonstrate against the illegal

^a U. S. Case, Appendix, 458.

^b British Case, Appendix, 117.

^c British Counter Case, 49.

and vexatious proceedings of the authorities of Nova Scotia towards our fishermen, and request that measures be forthwith adopted by Her Majesty's Government to remedy the evils arising out of this misconstruction, on the part of the provincial authorities, of their conventional obligations, and to prevent the possibility of the recurrence of similar acts.^a

The Secretary of State instructed the American minister in great detail, as to the claims of the United States under the treaty of 1818, which instructions Mr. Stevenson embodied in a note to Lord Palmerston, Her Majesty's principal secretary of state for foreign affairs, under date of March 27, 1841:

It also appears, from information recently received by the Government of the United States, that the provincial authorities assume a right to exclude the vessels of the United States from all their bays, (even including those of Fundy and Chaleurs,) and likewise to prohibit their approach within three miles of a line drawn from headland to headland, instead of from the indents of the shores of the provinces. They also assert the right of excluding them from British ports, unless in actual distress; warning them to depart, or get under weigh and leave harbor, whenever the provincial custom-house or British naval officer shall suppose that they have remained a reasonable time; and this without a full examination of the circumstances under which they may have entered the port. Now, the fishermen of the United States believe (and it would seem that they are right in their opinion, if uniform practice is any evidence of correct construction), that they can with propriety take fish anywhere on the coasts of the British provinces if not nearer than three marine miles to land, and have the right to resort to their ports for shelter, wood and water; nor has this claim, it is believed, ever been seriously disputed, based as it is on the plain and obvious terms of the convention. Indeed, the main object of the treaty was not only to secure to American fishermen, in the pursuit of their employment, the right of fishing, but likewise to insure to them as large a proportion of the conveniences afforded by the neighboring coasts of British settlements as might be reconcilable with the just rights and interests of British settlements, and the due administration of Her Majesty's Dominions. The construction therefore, which has been attempted to be put upon the stipulations of the treaty by the authorities of Nova Scotia, is directly in conflict with their object, and entirely subversive of the rights and interests of the citizens of the United States. It is one moreover, which would lead to the abandonment to a great extent, of a highly important branch of American industry, *which could not for a moment be admitted by the Government of the United States.* * * *

He has accordingly been instructed to bring the whole subject under the consideration of Her Majesty's Government, and to remonstrate on the part of his Government against the illegal and vexatious proceedings of the authorities of Nova Scotia against the citizens of the United States engaged in the fisheries, and to request that measures may be forthwith adopted by her Majesty's Government to remedy

^a U. S. Case, 100; Appendix, 460-462.

the evils arising out of the misconstruction on the part of its provincial authorities of their conventional obligations, and prevent the possibility of the recurrence of similar acts.^a

Lord Palmerston, in acknowledging the note of Mr. Stevenson, stated that he had "lost no time in referring Mr. Stevenson's representation to the secretary of state for the colonial department."^b

Mr. Stevenson, in this note to Lord Palmerston, a copy of which was now forwarded to the Provincial Government of Nova Scotia, had stated the position of the United States with reference to the interpretation of the renunciatory clause of the treaty.^c

It is worthy to be noted that the foreign office of Great Britain, at whose head was Lord Palmerston, did not answer the note of the American minister by taking the position now contended for in the British Case, that—

His Majesty's Government contend that the negotiators of the treaty meant by "bays," all those waters which at the time every one knew as bays.^d

On the contrary, the evidence bearing upon this period, is searched in vain for any assertion of past or present jurisdiction over the great outer bays. If there had been any claim of jurisdiction, the Government of Great Britain would now have rested its reply thereon.

The fact is, there never was any such assertion of jurisdiction, and the Government of Great Britain proceeded to make inquiry from the lieutenant-governor of the Province of Nova Scotia as to the "proceedings of the provincial authorities of Nova Scotia towards the vessels and citizens of that Republic [United States] engaged in fishing on the coasts of that Province."

THE HEADLAND THEORY.

It will be instructive to examine in detail the position assumed by the Province of Nova Scotia and the reasons therefor.

The Assembly of Nova Scotia had taken up, through one of its committees, the subject of the fisheries prior to the receipt by Lord Falkland of the inquiry of Lord Russell.

Lord Falkland, April 28, 1841, forwarded to Lord Russell a case-stated "for the purpose of being referred to the Crown Officers in England."^e

^a U. S. Case, 101-102; Appendix, 463.

^b U. S. Case, 103; Appendix, 465.

^c U. S. Case, Appendix, 463.

^d British Case, 83.

^e U. S. Case, 104; Appendix, 1043.

The despatch from Lord Falkland to Lord Russell is most enlightening in its bearing upon the position of Nova Scotia as to her jurisdiction over the disputed waters.

I transmit a copy of a report of a committee on the fisheries of Nova Scotia, which report has been adopted by the House of Assembly, and to which I have been requested to call your Lordship's attention.

The greatest anxiety is felt by the inhabitants of this province that the convention with the Americans, signed at London on the 20th October, 1818, *should be strictly enforced*; and it is hoped that the consideration of the report may induce your lordship to exert your influence in such a manner as to lead to the augmentation of the force (a single vessel) now engaged in protecting the fisheries on the Banks of Newfoundland, and the south shore of Labrador, and the employment in addition of one or two steamers for that purpose. * * *

I have the honor to forward herewith, in accordance with a request made to me in the same resolutions, a case stated (raising the necessary questions as to the right of fishery which the people of these colonies possess) for the purpose of being referred to the crown officers in England, in order that the existing treaties and the rights of these North American Provinces under them may be more strictly defined.

I shall feel obliged by your lordship's allowing the opinion of the Crown officers to be taken on the said case, and I am authorized by the House of Assembly here to defray any expense that may be incurred in obtaining such opinion.^a

There was no assertion of jurisdiction. Only "the greatest anxiety is felt by the inhabitants of this province that the convention with the Americans, signed at London on the 20th October, 1818, should be *strictly enforced*."

An examination of the case-stated, forwarded by Lord Falkland "at the request of the House of Assembly", will disclose the contention of Nova Scotia.

The case recited the provisions of Article III of the Treaty of 1783, Article I of the Treaty of 1818, the act of Geo. III, chap. 38, and the act of Nova Scotia of 1836, and then stated:

Nova Scotia is indented with bays, many of which reach from sixty to one hundred miles into the interior, such as the Bay of Fundy, St. Mary's Bay, the Bras d'Or Lake, and Manchester Bay. The land on the shores is entirely British territory, and Nova Scotia proper is separated from the Island of Cape Breton by a narrow strait called the Gut of Canso, in some parts not wider than three-quarters of a mile. In the *Bay of Fundy, St. Mary's Bay*, and the Gut of Canso, Americans *conduct the fishery*.^b

^a U. S. Case, Appendix, 1043-1044.

^b U. S. Case, Appendix, 1044.

Here is an admission that the Americans conducted the fishery in the Bay of Fundy; and indeed it has been beyond any doubt established that American vessels had frequented in great numbers the Bay of Fundy. There is no evidence anywhere to substantiate the statement of Lord Falkland cited in the British Case^a later made in a despatch to Lord Russell, when his attention was subsequently challenged by a statement in a note from Mr. Stevenson the minister for the United States, that the practice of resorting to the outer bays if not nearer than three miles to land had been resisted by the authorities of Nova Scotia.^b

The case-stated nowhere contained any assertion of jurisdiction over all bodies of water known as bays; and there was no assertion of jurisdiction with or without the acquiescence of the United States over any waters not found within the three-mile limit.

The opinion of the law officers of the Crown was requested on the following points material to this question:

(2) Have American citizens the right under that convention, to enter any of the bays of this Province to take fish, if after they have so entered they prosecute the fishery more than three marine miles from the shores of such bays; or should the prescribed distance of three marine miles be measured from the headlands, at the entrance of such bays, so as to exclude them. (3) If the distance of three marine miles is to be computed from the indents of the coast of British America, or from the extreme headlands, and what is to be considered a headland.^c

The opinion of the law officers of the Crown was rendered August 30, 1841.^d

This opinion was never communicated to the Government of the United States, and, although it failed to induce the Government of Great Britain to concur in the interpretation of the renunciatory clause sought by Nova Scotia, as will hereafter be shown, it nevertheless eventually became, after the urgent insistence of Nova Scotia, the foundation for the present position of Great Britain as shown by the note of Lord Aberdeen to Mr. Everett of March 10, 1845.^e

Therefore, it is important to clearly point out the extraordinary error in this opinion, upon which was buttressed the right of Great Britain to waters of great extent and of great importance to the people of the United States, and long resorted to by the vessels of the United States.

^a British Case, 87.

^b British Case, Appendix, 128.

^c U. S. Case, 105; Appendix, 1046.

^d U. S. Case, Appendix, 1047.

^e U. S. Case, 107, 115; Appendix, 489.

The opinion of the law officers of the Crown in so far as now material, was as follows:

2d. Except within certain defined limits to which the query put to us does not apply, we are of opinion that by the terms of the treaty, American citizens are excluded from the right of fishing within three miles of the coast of British America, and that the prescribed distance of three miles is to be measured from the headlands or extreme points of land next the sea of the coast, or of the entrance of the bays, and not from the interior of such bays or indents of the coast, and consequently that no right exists on the part of American citizens to enter the bays of Nova Scotia there to take fish, although the fishing being within the bay may be at a greater distance than three miles from the shore of the bay, *as we are of opinion the term headland is used in the treaty* to express the part of land we have before mentioned, excluding the interior of the bays and the indents of the coast.^a

The law officers of the Crown in turn did not base their decision upon any historic claim of jurisdiction over great bodies of water; they did not examine into the negotiations ante-dating and leading to the treaty of 1818 for the purpose of obtaining the true interpretation of this clause; they did not rest their opinion upon any general principles of international law establishing the extent of jurisdiction over the territorial sea; but relied entirely upon the alleged fact that the term "*headland*" was used in the treaty to express "extreme points of land next the sea of the coast or of the entrance of the bays."

The opinion rested solely upon the use of the term "*headland*," in the treaty, when as a matter of fact, the word "*headland*" does not appear in the treaty. They made the grievous error of adopting the words of the case-stated instead of reading, considering, and passing upon the words of the treaty.^b

It is to be regretted that this opinion was not communicated to the Government of the United States, and did not become the subject of diplomatic discussion.

This opinion was withheld until the 28th November, 1842, when Lord Stanley enclosed it in a note to Lord Falkland:

I enclose for your information a copy of the report which on the 30th August, was received from the Queen's advocate and Her Majesty's attorney-general, on the case drawn up by your lordship; since that date the subject has frequently engaged the attention of myself and my colleagues, with the view of adopting further measures if necessary, for the protection of British interest in accordance with the law as laid down in the enclosed report. *We have, however, on full consideration come to the conclusion, as regards the fisheries of*

^a U. S. Case, Appendix, 1047.

^b U. S. Case, 107.

Nova Scotia, that the precautions taken by the provincial legislature appear adequate to the purpose, and that being now practically acquiesced in by the Americans, no further measures are required.^a

Of course, there was no acquiescence in this interpretation by the United States, as the opinion of the law officers of the Crown had not been given to the Government of the United States, and there had been no communication from the Government of Great Britain upon the subject of Mr. Stevenson's note.^b

In the light of the interpretation sought to be enforced by the authorities of the Province of Nova Scotia, it is not unexpected that there is found in the Appendix to British Case a despatch from Lord Stanley to Lord Falkland, dated May 19, 1845, the important part of which is now for the first time made known to the Government of the United States, announcing that—

Her Majesty's Government therefore henceforward propose to regard as bays in the sense of the treaty, only those inlets of the sea which measure from headland to headland at their entrance, the double of the distance of three miles, within which it will still be prohibited to the fishing vessels of the United States to approach the coast for the purpose of fishing.^c

THE "WASHINGTON" AND THE "ARGUS" CASES.

The fishermen of the United States continued to prosecute the fisheries in the Bay of Fundy and other large outer bays, and in the spring of 1843 the authorities of Nova Scotia, for the purpose of making a test case, seized the American schooner *Washington* on the 10th May, 1843, "while fishing in the Bay of Fundy ten miles from the shore."^d

The seizure was promptly reported to the State Department, June 30, 1843, and Mr. Upshur, Secretary of State, sent a despatch to Mr. Everett, minister for the United States at London, instructing him to present the subject of the seizure to Her Majesty's Government:

I need not remark upon the importance to the negotiating interests of the United States of having a proper construction put upon the first article of the convention of 1818 by the parties to it. That which has hitherto obtained is believed to be the correct one. The obvious necessity of an authoritative intervention to put an end to proceedings on the part of the British colonial authorities, alike

^a U. S. Case, 108; Appendix, 1046.

^b U. S. Case, 108.

^c British Case, Appendix, 145; U. S. Case, 118-119.

^d U. S. Case, 109, 131; Appendix, 474.

conflicting with their conventional obligations and ruinous to the fortunes and subversive of the rights of an enterprising and deserving class of our fellow citizens, is too apparent to allow this Government to doubt that the Government of Her Britannic Majesty will take efficient steps for the purpose. The President's confident expectation of an early and satisfactory adjustment of these difficulties is grounded upon his reliance on the sense of justice of the Queen's Government, *and on the fact that from the year 1818, the date of the convention until some years after the enactment of the provincial law out of which these troubles have arisen a practical construction has been given to the first article of that instrument which is firmly relied on as settling its meaning in favor of the rights of American citizens as claimed by the United States.*

I have therefore, to request that you will present this subject again to the consideration of Her Majesty's Government by addressing a note to the British secretary of state for foreign affairs, reminding him that the letter of Mr. Stevenson to Lord Palmerston remains unanswered, and informing him of the anxious desire of the President that proper means should be taken to prevent the possibility of a recurrence of any like cause of complaint.*

It is apparent from this note, not only that the United States had not "practically acquiesced," but that the Government of Great Britain had not after mature deliberation, extending from the time of the receipt of the opinion of the law officers of the Crown in August, 1841, until November, 1842, advised the minister of the United States or the Department of State of the new interpretation put upon the treaty by the authorities of Nova Scotia, and the law officers of the Crown. It is manifest also from the tenor of the note of Lord Stanley to the lieutenant-governor of Nova Scotia, that the Government of Great Britain was not prepared to support the new interpretation, and did not intend enforcing what the authorities of Nova Scotia had termed a *strict* construction of the treaty.

Mr. Everett, August 10, 1843, in pursuance of his instructions, transmitted to the Earl of Aberdeen, then Her Majesty's principal secretary of state for foreign affairs, the papers bearing upon the seizure of the *Washington*:

The right therefore, of fishing on any part of the coast of Nova Scotia, at a greater distance than three miles, is so plain that it would be difficult to conceive on what ground it could be drawn in question, had not attempts been already made by the provincial authorities of Her Majesty's colonies, to interfere with its exercise. These attempts have formed the subject of repeated complaints on the part of the Government of the United States, as will appear from several notes addressed by the predecessor of the undersigned to Lord Palmerston.

From the construction attempted to be placed, on former occasions, upon the first article of the treaty of 1818, by the colonial authorities,

* U. S. Case, Appendix, 471.

the undersigned supposes that the *Washington* was seized because she was found fishing in the Bay of Fundy, and on the ground that the lines within which American vessels are forbidden to fish, are to run from headland to headland, and not to follow the shore. It is plain, however, that neither the words nor the spirit of the convention admits of any such construction, nor, it is believed, was it set up by the provincial authorities for several years after the negotiation of that instrument. A glance at the map will show Lord Aberdeen that there is, perhaps, no part of the great extent of the seacoasts of Her Majesty's possessions in America, in which the right of an American vessel to fish can be subject to less doubt than that in which the *Washington* was seized. * * *

In reference to the case of the *Washington* and those of a similar nature which have formerly occurred, the undersigned cannot but remark upon the impropriety of the conduct of the colonial authorities in undertaking, without directions from Her Majesty's Government, to set up a new construction of a treaty between the United States and England, and in proceeding to act upon it by the forcible seizure of American vessels. * * *

The undersigned need not urge upon Lord Aberdeen the desirableness of an authoritative intervention on the part of Her Majesty's Government to put an end to the proceedings complained of. The President of the United States entertains a confident expectation of an early and equitable adjustment of the difficulties which have been now for so long time under the consideration of Her Majesty's Government. This expectation is the result of the President's reliance upon the sense of justice of Her Majesty's Government, and of the fact that, from the year 1818, the date of the convention, until some years after the attempts of the provincial authorities to restrict the rights of American vessels by colonial legislation, a practical construction was given to the 1st article of the convention, in accordance with the obvious purport of its terms and settling its meaning as understood by the United States.^a

The Government of Great Britain again declined to assert jurisdiction over the large bodies of water, to which American fishermen were free to resort and had resorted for years prior to the treaty of peace in 1783, for thirty-five years thereafter until the treaty of 1818, and for twenty-five years since the treaty of 1818; but referred the note of Mr. Everett to the lieutenant governor of Nova Scotia.

Lord Aberdeen, after delaying eight months, replied to the note of Mr. Everett, April 15, 1844.

Lord Aberdeen quoted the renunciatory clause of the treaty, and continued:

It is thus clearly provided that American fishermen shall not take fish within three marine miles of any bay of Nova Scotia, etc. If the treaty was intended to stipulate simply that American fishermen should not take fish within three miles of the coast of Nova Scotia, etc., there was no occasion for using the word "bay" at all. But the proviso at the end of the article shows that the word "bay"

^a U. S. Case, Appendix, 474.

was used designedly; for it is expressly stated in that proviso, that under certain circumstances the American fishermen may enter bays, by which it is evidently meant that they may, under those circumstances, pass the sea line which forms the entrance of the bay. The undersigned apprehends that this construction will be admitted by Mr. Everett.

That the *Washington* was found fishing within the Bay of Fundy is, the undersigned believes, an admitted fact, and she was seized accordingly.^a

The argument of Lord Aberdeen that, inasmuch as there was a provision permitting American vessels to enter bays, creeks, and harbors for the purpose of shelter, wood, water, and repairs, therefore the word "bay" was intended to refer to the large outer bays as well as to the small inner bays is far from convincing. The bays, creeks, and harbors, which the American fishermen desired to enter for shelter, wood, water, and repairs, were necessarily those small bodies of water within which lay shelter, and along the shores of which had been established settlements, where wood, water, and materials for repairs could be obtained.

The Government of Great Britain had been persuaded against their will by the authorities of Nova Scotia to advance the provincial contention as to the construction of this clause.

Nevertheless, Great Britain never issued orders to enforce this Nova Scotia theory, or authorized the provincial authorities to do so, and shortly made a so-called concession to the United States regarding the particular waters then in controversy, the Bay of Fundy, and finally in 1845 Lord Stanley advised Lord Falkland, lieutenant-governor of Nova Scotia, that—

Her Majesty's Government therefore henceforward propose to regard as bays in the sense of the treaty, only those inlets of the sea which measure from headland to headland at their entrance, the double of the distance of three miles, within which it will still be prohibited to the fishing vessels of the United States to approach the coast for the purpose of fishing.^b

In May, 1844, Mr. Everett replied to Lord Aberdeen's note of April 15 of that year:

In reference to the case of the *Washington*, Lord Aberdeen, in his note of the 15th of April, justifies her seizure by an armed provincial vessel on the assumed fact that as she was found fishing in the Bay of Fundy, she was within the limits from which the fishing vessels of the United States are excluded by the provisions of the convention between the two countries of October, 1818. * * *

^a U. S. Case, 110; Appendix, 477.

^b British Case, Appendix, 145; U. S. Case, 117-118.

With respect to the main question of the right of American vessels to fish within the acknowledged limits of the Bay of Fundy, it is necessary for a clear understanding of the case, to go back to the treaty of 1783.^a

Here Mr. Everett cited the second part of Article III of the treaty of 1783, and continued:

These privileges and conditions were in reference to a country of which a considerable portion was then unsettled, likely to be attended with differences of opinion as to what should, in the progress of time, be accounted a settlement from which American fishermen might be excluded. These differences in fact arose, and by the year 1818 the state of things was so far changed that Her Majesty's Government thought it necessary in negotiating the convention of that year, entirely to except the Province of Nova Scotia from the number of the places which might be frequented by Americans as being in part unsettled, and to provide that the fishermen of the United States should not pursue their occupation within three miles of the shores, bays, creeks and harbors of that and other parts of Her Majesty's possessions similarly situated. The privilege reserved to American fishermen by the treaty of 1783, of taking fish in all the waters and drying them on all the unsettled portions of the coast of these possessions was accordingly by the convention of 1818 restricted as follows:

Mr. Everett here quoted the words of the renunciatory clause and again continued:

The existing doubt as to the construction of the provision arises from the fact that a broad arm of the sea runs up to the northeast between the provinces of New Brunswick and Nova Scotia. This arm of the sea being commonly called the Bay of Fundy, though not in reality possessing all the characters usually implied by the term "bay," has of late years been claimed by the provincial authorities of Nova Scotia to be included among the "coasts, bays, creeks and harbors forbidden to American fishermen."

An examination of the map is sufficient to show the doubtful nature of this construction. It was notoriously the object of the article of the treaty in question to put an end to the difficulties which had grown out of the operations of the fishermen from the United States along the coasts and upon the shores of the unsettled portions of the country, and for that purpose to remove their vessels to a distance not exceeding three miles from the same. *In estimating this distance, the undersigned admits it to be the intent of the treaty, as it is itself reasonable, to have regard to the general line of the coast; and to consider its bays, creeks and harbors, that is, the indentations usually so accounted, as included within that line.* But the undersigned cannot admit it to be reasonable, instead of thus following the general directions of the coast, to draw a line from the southwesternmost point of Nova Scotia to the termination of the northeastern boundary between the United States and New Brunswick, and to consider the arms of the sea which will thus be cut off, and which cannot, on that line be less than sixty miles wide, as one of the bays on the coast from

^a U. S. Case, 110-111; Appendix, 479.

which American vessels are excluded. By this interpretation the fishermen of the United States would be shut out from the waters distant, not three, but thirty miles from any part of the colonial coast. The undersigned cannot perceive that any assignable object of the restriction imposed by the convention of 1818 on the fishing privilege accorded to the citizens of the United States by the treaty of 1783 requires such a latitude of construction.

It is obvious that (by the terms of the treaty) the farthest distance to which fishing vessels of the United States are obliged to hold themselves from the colonial coasts and bays, is three miles. But, owing to the peculiar configuration of these coasts, there is a succession of bays indenting the shores both of New Brunswick and Nova Scotia, within the Bay of Fundy. The vessels of the United States have a general right to approach all the bays in Her Majesty's colonial dominions, within any distance not less than three miles—a privilege from the enjoyment of which they will be wholly excluded—in this part of the coast, if the broad arm of the sea which flows up between New Brunswick and Nova Scotia, is itself to be considered one of the forbidden bays.

Lastly—and this consideration seems to put the matter beyond doubt—the construction set up by Her Majesty's colonial authorities, would altogether nullify another, and that a most important stipulation of the treaty, about which there is no controversy, viz: the privilege reserved to American fishing vessels of taking shelter and repairing damages in the bays within which they are forbidden to fish. There is of course, no shelter nor means of repairing damages for a vessel entering the Bay of Fundy, in itself considered. It is necessary, before relief or succor of any kind can be had, to traverse that broad arm of the sea and reach the *bays and harbors, properly so called, which indent the coast, and which are no doubt the bays and harbors referred to in the convention of 1818.* The privilege of entering the latter in extremity of weather, reserved by the treaty, is of the utmost importance. It enables the fishermen, whose equipment is always very slender (that of the *Washington* was four men all told) to pursue his laborious occupation with comparative safety, in the assurance that in one of the sudden and dangerous changes of weather so frequent and so terrible on this iron bound coast, he can take shelter in a neighboring and friendly port. To forbid him to approach within thirty miles of that port, except for shelter in extremity of weather, is to forbid him to resort there for that purpose. It is keeping him, at such a distance at sea as wholly to destroy the value of the privilege expressly reserved.

In fact, it would follow, if the construction contended for by the British colonial authorities were sustained, that two entirely different limitations would exist in reference to the right of shelter preserved to American vessels on the shores of Her Majesty's colonial possessions. They would be allowed to fish within three miles of the place of shelter along the greater part of the coast; while in reference to the entire extent of shore within the Bay of Fundy, they would be wholly prohibited from fishing along the coast, and would be kept at a distance of twenty or thirty miles from any place of refuge in case of extremity. There are certainly no obvious principles which render such a construction probable.

The undersigned flatters himself that these considerations will go far to satisfy Lord Aberdeen of the correctness of the American understanding of the words "Bay of Fundy," arguing on the terms of the treaties of 1783 and 1818. When it is admitted that, as the undersigned is advised, there has been no attempt till late years to give them any other construction than that for which the American Government now contends, the point would seem to be placed beyond doubt.^a

While this note is under consideration, is an opportune time to correct a remarkable statement in the British Case:

It would seem that the British contention with an exception in favor of the Bay of Fundy, was officially accepted by the United States Government, at least it was accepted by Mr. Everett, United States minister in London.^b

Now what Mr. Everett did say has just been quoted:

- In estimating this distance [three marine miles] the undersigned admits it to be the intent of the treaty as it is itself reasonable to have regard to the general line of the coast; and to consider its bays, creeks and harbors, that is the indentations usually so accounted, as included in that line. * * *

There is, of course, no shelter or means of repairing damages for a vessel entering the Bay of Fundy, in itself considered. It is necessary, before relief or succor can be had to traverse that broad arm of the sea, and reach the bays and harbors properly so called which indent the coast and which are no doubt the bays and harbors referred to in the convention of 1818.

Lord Aberdeen did not reply to Mr. Everett's note until March 10, 1845, nearly a year afterward.^c

In the meantime, however, the authorities of Nova Scotia seized the American fishing schooner *Argus* off the coast of Cape Breton and about sixteen miles from any shore. The seizing officer claimed the vessel was within three miles of a line drawn from Cow Bay Head to Cape North, and on their construction of the treaty, "he said he seized us to settle the question."^d

In October, 1844, Mr. Everett transmitted to Lord Aberdeen, the papers relating to the capture of the *Argus*, and stated, "the undersigned again feels it his duty on behalf of his Government, to formally protest against an act of this description."

BRITISH ATTITUDE TOWARD THE NOVA SCOTIA THEORY.

In March, 1845, Lord Aberdeen advised Mr. Everett at length concerning the views of Great Britain:

Her Majesty's Government must still maintain and in this view *they are fortified by high legal authority*, that the Bay of Fundy

^a U. S. Case, 112; Appendix, 479.

^c U. S. Case, 114; Appendix, 488.

^b British Case. 83.

^d U. S. Case, 114; Appendix, 483, 485.

is rightfully claimed by Great Britain as a bay within the meaning of the treaty of 1818. And they equally maintain the position which was laid down in the note of the undersigned, dated the 15th of April last, that with regard to the other bays on the British American coasts, no United States' fishermen has, under that convention, the right to fish within three miles of the entrance of such bays as designated by a line drawn from headland to headland at that entrance.^a

The "high legal authority" was the remarkable opinion of the Law Officers of the Crown.

It is, therefore, apparent from Lord Aberdeen's note that the Government of Great Britain did not regard the Bay of Fundy as coming under any different rule of law than any of the other bays on the British American coast. This becomes important in view of the fact that it may be concluded that the concession, to be hereafter noted, regarding the Bay of Fundy was based upon some conclusion not applicable to the other bays; and especially is this important in the light of the decision rendered in 1856 on the legality of the seizure of the *Washington*.

Lord Aberdeen nevertheless informed the Minister of the United States:

* * * The undersigned has accordingly much pleasure in announcing to Mr. Everett, the determination to which Her Majesty's Government have come to relax in favor of the United States fishermen that right which Great Britain has hitherto exercised, of excluding those fishermen from the British portion of the Bay of Fundy, and they are prepared to direct their colonial authorities to allow henceforward the United States fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach except in the cases specified in the treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick.^a

In this note, the Government of Great Britain conceded that the fishermen of the United States could fish within the waters of the Bay of Fundy, but must not approach within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick.

The Government of Great Britain here occupies the position of the Government of the United States with reference to the Bay of Fundy, and applied the term "three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America," to bays found within the three mile limit.

In fact, Great Britain had undoubtedly at this time determined not to enforce the Nova Scotia theory of interpretation. The head-

^a U. S. Case, 115; Appendix, 489.

land theory had failed to convince the Government of Great Britain, for after the receipt of the opinion of the law officers of the Crown, Lord Aberdeen had conceded the waters immediately in dispute, and had instructed Lord Stanley to advise the authorities of Nova Scotia—

To regard as bays in the sense of the treaty only those inlets of the sea which measure from headland to headland at their entrance, the double of the distance of three miles.^a

While making this so-called concession, which however the Government of the United States was unwilling to accept as a concession, as will later appear, Lord Aberdeen took occasion to bring forward for the first time a suggestion that the United States should reduce its customs duties on the product of the British colonial fishermen.

In thus communicating to Mr. Everett the liberal intentions of Her Majesty's Government, the undersigned desires to call Mr. Everett's attention to the fact that the produce of the labor of the British colonial fishermen is at the present moment excluded by prohibitory duties on the part of the United States from the markets of that country; and the undersigned would submit to Mr. Everett that the moment at which the British Government are making a liberal concession to United States' trade might well be deemed favorable for a counter concession on the part of the United States to British trade, by the reduction of the duties which operate so prejudicially to the interests of the British colonial fishermen.^b

The Government of the United States is now furnished by the British Case the opportunity of ascertaining the original source of this suggestion, and it will be found that it came from the authorities of the Province of Nova Scotia.

Lord Falkland in a note to Lord Stanley, September 17, 1844, stated:

I regret much that the course which I view as unobjectionable in this matter will not be so regarded by the provincial legislature, and I feel very sensibly that while the Americans seek for every advantage to be obtained by exercising the rights of fishery on the coasts of Nova Scotia, the produce of the labor of the *provincial fisherman* is excluded from the markets of the United States by prohibitive duties. This consideration induces me to submit to your lordship whether an opportunity of strongly urging on the Government of the United States the immediate diminution of these duties is not afforded by the present negotiation.^c

That Great Britain declined to enforce the Nova Scotia theory of construction is abundantly established.

^a British Case, Appendix, 146.

^c British Case, Appendix, 136.

^b U. S. Case, 120; Appendix, 489.

When a few years later, just preceding the reciprocity treaty of 1854, a discussion between the two Governments arose as to the nature of the orders, in respect of the fisheries, of the Admiralty to Her Majesty's force in the North Atlantic, the statement was made by Lord Malmesbury that "the British Government did not intend to assert any new principle," but "that an armed force was sent there at this time to keep the American fishermen three miles from the British shores in accordance with the provisions of the Convention of 1818."^a The orders issued by Vice-Admiral Seymour, which Lord Malmesbury stated were not intended to assert any new principle, were not to detain vessels unless found trespassing within three miles of *land*;^b and Lord Malmesbury in a note to Mr. Crampton, August 11, 1852, referring to the instructions issued to Vice-Admiral Seymour, stated:

Her Majesty's Government will at once adopt the precaution of *repeating the instructions on which during a long series of years British admirals commanding on the North American station have invariably acted.*^c

It is necessary, in connection with this period, that it should be clearly understood that Mr. Everett, in behalf of the Government of the United States, did not accept the decision of the British Government in reference to the waters of the Bay of Fundy as a concession.

The Earl of Aberdeen in a note dated April 21, 1845, acknowledged the receipt of two notes from Mr. Everett relative to the case of the *Argus* and that of the *Washington*, and advised Mr. Everett that—

those notes have been brought under the consideration of Her Majesty's secretary of state for the colonies, *and the undersigned postpones, therefore, replying to their contents until he shall become acquainted with the results of that conference.*

In the meantime, however, the undersigned thinks it expedient to guard himself against the assumption of Mr. Everett that it may have been his intention by his note of the 10th ultimo to include other bays on the coast of British North American provinces in the relaxation which he therein notified to Mr. Everett as to be applied henceforward to the Bay of Fundy. That note was intended to refer to the Bay of Fundy alone.^d

Mr. Everett accordingly advised the Secretary of State that—

I received last evening the answer of his lordship, informing me that my two notes had been referred to the colonial office and that a *final reply* could not be returned till he should be made acquainted

^a U. S. Case, 123; Appendix, 516.

^c British Case, Appendix, 172.

^b U. S. Case, Appendix, 1082.

^d U. S. Case, 117; Appendix, 505.

with the result of that reference, and that in the meantime the concession must be understood to be limited to the Bay of Fundy.^a

Lord Aberdeen in this last note makes reference to the fact that the notes of Mr. Everett had been referred to the secretary of state for the colonies. The Case of Great Britain now furnishes the additional information, that Lord Aberdeen reached a decision in complete accord with the contention of the Government of the United States and so advised the secretary of state for the colonies. In the note of Lord Stanley to Lord Falkland, which advised the Government of Nova Scotia of the decision of the Government of Great Britain, that "Her Majesty's Government therefore henceforward propose to regard as bays in the sense of the treaty only those inlets of the sea which measure from headland to headland at their entrance, the double of the distance of three miles," he stated:

I transmit to your Lordship herewith the copy of a letter together with its enclosures which I have received from the foreign office upon this subject, from which you will learn the general views entertained by Her Majesty's Government as to the expediency of extending to the whole of the coasts of the British possessions in North America the same liberality with respect to United States fishing boats as Her Majesty's Government have recently thought fit to apply to the Bay of Fundy.^b

Inasmuch as this note from Lord Stanley actually enclosed a copy of a letter from Her Majesty's principal secretary of state for foreign affairs, Lord Aberdeen, and, with the knowledge in mind that the enclosure is not offered in evidence by Great Britain and has not been produced, although requested by the United States, it is surprising to read in the British Counter Case the statement ^c that; "Afterwards the new Colonial Secretary, Lord Stanley, not apparently appreciating the value of the Bays as fishing grounds, suggested to the Governors of Nova Scotia and New Brunswick a further relaxation."

The evidence establishes that Lord Stanley was formally instructed by the British Government to communicate their views to the provinces, although the request is withheld from the evidence.

After the receipt of this letter from Lord Aberdeen enclosed in the note from Lord Stanley, Lord Falkland stated in his letter of July 2, 1845, to Lord Stanley:

I earnestly hope that if any further privileges injurious to the local interests of the inhabitants of this colony are accorded to the fisher-

^a U. S. Case, 117; Appendix, 506.

^c British Counter Case, 53.

^b British Case, Appendix, 145.

men of the United States, some such compensating advantages as are pointed out in my despatch No. 271 of the 17th September, 1844, will be demanded and obtained for the fishermen of Nova Scotia, and I take the liberty of again requesting your Lordship to bring this important point under the notice of the secretary of state for foreign affairs.^a

The Government of Great Britain did not notify the Government of the United States through its minister at London, or in any other manner, of its *final* conclusion, which was to be made after the notes complaining of the seizures had been brought to the attention of the colonial office.

The protests of Nova Scotia against the decision of the British Government to concur in the interpretation of the Government of the United States, accompanied by the suggestion of negotiating until some compensating advantages could be obtained for the fishermen of Nova Scotia, did not result in any attempt to enforce the Nova Scotia interpretation of this renunciatory clause. The American fishermen were not molested in the pursuit of their occupation in the great outer bays along the coasts of the British possessions.

THE NOVA SCOTIA THEORY NOT ADOPTED BY THE OTHER COLONIES.

The Journal of the Legislative Assembly of Newfoundland in 1845 contains a report of a committee of the Assembly:

Your committee in referring to the American fisheries have also to say that they have no data to ground a correct estimate of them, but they can state that it is very extensive, employing from 1,500 to 2,000 sail of decked vessels, averaging from 40 to 100 tons burthen. The catch of fish in the British waters has been estimated at 1,100,000 quintals, which must give employment to 25,000 fishermen and seamen. The American fishers are observed in great numbers on the Grande Bank and on the fishing grounds in the Gulf of St. Lawrence, all along the *shores* of Nova Scotia, Prince Edward's Island, Newfoundland, and the shores of Labrador.^b

This committee understood that "by the convention of 1818, the Americans of the United States are allowed to fish along all our coasts, and harbours, within three marine miles of the shore (an indefinite distance)." It is evident that the Newfoundland Government did not agree with the Nova Scotia interpretation, for, if the fishermen of the United States were entitled to fish along all the coasts and harbors of Newfoundland, within three marine miles

^a British Case, Appendix, 150.

^b U. S. Case, Appendix, 1068.

of the shore, the same treaty did not surrender the like right along the other non-treaty coasts of the British possessions in North America.

No attempt was made during this period by any other province to interfere with the fisheries.

On September 17, 1855, in reply to a despatch from the colonial office of Great Britain, requesting the governor of Newfoundland to forward to the British minister at Washington "authentic copies of all the laws and regulations of the legislature or other competent authority of Newfoundland on the subject of the fisheries of this island," the attorney-general and solicitor-general of Newfoundland reported:

We have the honor to report in compliance with the desire of his excellency that apart from the common law of England which is in operation here so far as it is applicable to the circumstances of the colony, and the several treaties defining the relative rights of England, France and the United States of America to the fisheries of this colony, there are no special enactments of the local legislature in operation here for the regulation of the fisheries.^a

In connection with the observation of the committee of the Newfoundland Assembly that the fishermen of the United States were allowed to fish along all the coasts and harbors within three marine miles of the shore, the following instruction of August 3, 1863, from the Duke of Newcastle to Governor Bannerman of Newfoundland is important:

That if any misconception exists in Newfoundland respecting the limits of the colonial jurisdiction, it would be desirable that it should be put at rest by embodying in the act a distinct settlement (statement) that the regulations contained in it are of no force except within three miles of the shore of the colony.^b

While the Province of Prince Edward's Island enacted April 15, 1843, a law similar to the Nova Scotia act of 1836, no attempt was ever made to enforce its terms.

Governor Bannerman, February 12, 1852, in a note to Lord Gray, referring to this act, stated:

The provisions of this act have not yet been enforced; and should the fishery question remain much longer unsettled in all probability attempts will be made to seize American fishing vessels, and such attempts may be resisted, which may lead to collision the consequences of which are not easily to be foreseen.^c

The Province of New Brunswick enacted no law similar to the Nova Scotia act of 1836 until May 3, 1853.

^a U. S. Counter Case, 22; Appendix, 251. ^c U. S. Counter Case, Appendix, 217.

^b U. S. Case, 191; Appendix, 1082.

THE SITUATION FROM 1852 TO 1854.

The government of Lord Malmesbury was formed in 1852.

Sir John Packington was secretary of state for the colonies, and in May, 1852, he addressed a letter to the governors of the several North American colonies, stating:

Her majesty's ministers are desirous of removing all grounds of complaint on the part of the colonies in consequence of the encroachments of the fishing vessels of the United States upon those waters from which they are excluded by the terms of the convention of 1818, and they therefore intend to dispatch, as soon as possible, a small naval force of steamers or other small vessels to enforce the observance of that convention.^a

Mr. Webster, Secretary of State of the United States, was also informed ^b that the British colonies complained "that the Government declined to enforce the provisions of the fisheries convention of 1818, thereby permitting American fishermen to encroach upon the best fishing ground, from which under the legal construction of the treaty they ought to be excluded." This complaint was lodged against the former ministry, and it was reported that "with the recent change of ministry in England, has occurred an entire change of policy."

The Secretary of State, fearful lest there should be a complete interruption of the extensive fishing business of the United States, issued, under date of July 6, 1852, a public letter which appeared July 19 in a Boston newspaper.^c Mr. Webster closed his letter, issued for the purpose of warning American fishermen of the supposed change of policy, with the words:

Not agreeing that the construction thus put upon the treaty is conformable to the intentions of the contracting parties, this information is however made public to the end that those concerned in the American fisheries may perceive how the case at present stands, and be upon their guard. The whole subject will engage the immediate attention of the Government.^d

The evidence before the Tribunal other than this statement in Mr. Webster's public letter also completely refutes the assertion in the British Case,^e that the view of Mr. Webster was in accord with the present position of Great Britain.

The publication of this letter by the Secretary of State occasioned considerable commotion in the British Government, and Lord

^a U. S. Case, 122; Appendix, 508.

^b U. S. Case, Appendix, 507.

^c U. S. Case, 122; Appendix, 507.

^d U. S. Case, Appendix, 510.

^e British Case, 84.

Malmesbury, then secretary of state for foreign affairs, in an interview with Mr. Lawrence, the American minister, August 7, 1852, stated :

That the British Government *did not intend to assert any new principle* but only to protect the rights of the colonists in the fisheries, which had been neglected by their predecessors. That what had been done had been done at the urgent request of the colonists themselves; that the concessions made by Lord Aberdeen of the right to fish in the Bay of Fundy were fully recognized by the present government, and would not be withdrawn; that an armed force was sent there at this time to keep the American fishermen *three miles from the British shores in accordance with the provisions of the convention of 1818*. That the orders were the same both with respect to French and the American fishermen, and finally that Her Majesty's Government did not intend by sending an armed force into those waters to give offence either to the Government or to the people of the United States, the sole object being to maintain the neglected rights of the colonists.^a

The evidence is now furnished in the British Case, although the orders are withheld, that the orders to be issued by Lord Malmesbury, whatever their nature, were to be in harmony with the instructions issued during a long series of years by Her Majesty's Government :

Her Majesty's Government will at once adopt the precaution of *repeating the instructions on which during a long series of years British admirals commanding on the North American station have invariably acted*, and they will further instruct Sir George Seymour to use the utmost forbearance and moderation in dealing with such American vessels as may be found manifestly infringing the terms of the treaty.

It is almost needless to add that in regard to the Bay of Fundy where a special permission to fish has been granted to American fishermen, their vessels will be in no way interfered with, but it must be understood that the three mile limit from the shore will as before be maintained.^b

Vice-Admiral Seymour, who was in command of the British vessels on the North Atlantic station, on August 23, 1852, in a note to Lieutenant-Governor Le Marchant, who had succeeded Lord Falkland in Nova Scotia, stated :

I have the honor to forward your excellency a copy of statements made to the officers of the hired armed tender *Telegraph* as I think it right you should be informed of the notices which are said to have been issued to the fishing vessels of the United States, by the commanders of the provincial vessels employed for the protection of the fisheries; and I am not aware of the lines therein described having been sanctioned by authority.^c

^a U. S. Case, 123; Appendix, 516.

^b British Case, 125; Appendix, 172.

^c U. S. Case, 126; Appendix, 1078.

August 26, 1852, Lieutenant Governor Le Marchant replied to the note of Vice-Admiral Seymour:

Referring to your excellency's letter of the 23d instant, which, with its enclosures I have had the honor to receive, I beg to remind you that copies of the instructions under which the captains of the provincial cruisers are acting, are in your excellency's possession. *On reference to these you can satisfy yourself that they contain no authority whatever to act upon our [Nova Scotia's] construction of the convention, except where vessels are actually found fishing within three marine miles of the shore.*^a

The provincial secretary of Nova Scotia, August 26, 1852, advised Captain Laybold, who was in command of the provincial cruiser *Halifax*:

I am commanded by the lieutenant governor to call your attention to the enclosed copy of a despatch from Vice Admiral Sir George F. Seymour, with statements of certain masters of American fishing vessels enclosed. You will without delay, furnish me with such explanation as will enable the lieutenant governor to judge how far the conversations which are made matter of complaint, have been accurately reported. *And, in the meantime, you will take care to detain no vessel which is not found trespassing within three miles of land.*^b

Captain Dodd, in command of the provincial cruiser *Responsible*, wrote to Provincial Secretary Howe of Nova Scotia, August 29, 1852:

The assertion of William Page, master of the schooner *Paragon*, may be correct, for I did to several American captains (and he may have been one of them), say that I should draw a line from the headlands of the coast and bays of Cape Breton, and seize all American vessels found trespassing within three marine miles of such line; and such are my intentions until further orders, as I consider myself bound to do so by my instructions, in which I am referred to the convention of 1818; and as it would be great presumption in me to attempt to put any construction on that treaty, *I feel myself bound by the opinions of the Queen's advocate, and Her Majesty's attorney-general, given in 1841*; and also by the result of the trial of the American schooner *Argus*, which vessel was seized by me within a line drawn from Cow Bay Head to Long Point, near Cape North, Cape Breton, and condemned.^c

September 1, 1852, Captain Dodd, having received the note of the provincial secretary, replied:

I have the honor to acknowledge the receipt of your letter dated 26th August, enclosing a copy of a despatch from Vice-Admiral Sir George F. Seymour, with statements of certain masters of American fishing vessels, a copy of which statements was handed to me by

^a U. S. Case, Appendix, 1079.

^b U. S. Case, 127; Appendix, 1080.

^c U. S. Case, 127; Appendix, 1081.

the vice-admiral on the 27th of August, and which I answered on the 29th.

The orders not to detain vessels unless found trespassing within three miles of land shall be strictly attended to.^a

The Government of Great Britain having issued instructions to the admiral in command on the North Atlantic station not to interfere with American fishing vessels unless found trespassing within three miles of *land*, no further correspondence in respect of seizures occurred during this period between the two Governments.

The revival of the controversy by the provincial authorities appears to have been inseparably connected with the attempt to secure freer trade relations with the United States.

In August, 1852, Lord Malmesbury, in an instruction to Mr. Crampton, the British minister at Washington, stated:

You will read this despatch to Mr. Webster, and in leaving a copy of it with him, you will not fail to assure him and to request him to assure the President of the United States that Her Majesty's Government continue to feel the same anxiety that has long been felt in this country for the maintenance of the best relations between the two governments, and it will be to them a source of sincere satisfaction if the attention which has thus been drawn to the subject of the fisheries should lead to an adjustment, by amicable negotiations, upon a more satisfactory footing than at present, of the system of commercial intercourse between the United States and Her Majesty's North American colonial possessions.^b

The orders of the Government of Great Britain to the Admiralty were not modified prior to the reciprocity treaty of 1854. While there is to be found in the various notes and dispatches of the British Government expressions of opinion as to the rights of Great Britain under the Nova Scotia interpretation of the treaty, nevertheless it is established beyond all controversy that it was the deliberate judgment of the Government of Great Britain to regard as bays "only those inlets of the sea which measure from headland to headland at their entrance the double of the distance of three miles," as determined by Lord Aberdeen. The orders issued from the date of the treaty, in so far as disclosed by the evidence, were "not to detain vessels unless found trespassing within three miles of land," and "only to prevent their fishing nearer than three miles" to land.

In the Case of the United States the orders issued to the naval forces of Great Britain in the North Atlantic which were accessible

^a U. S. Case, 127; Appendix, 1082.

^b U. S. Case, Appendix, 522.

to the United States in public records, were placed in evidence, and it was there shown that no attempt was made on the part of Great Britain to interfere, in the earlier period or during this period, with American vessels unless found within three miles of land.

The Counter Case of Great Britain does not question this fact and offers no evidence in contradiction of it, nor are any orders issued to the naval forces in the North Atlantic covering these periods placed in evidence by Great Britain. The facts presented in the Case of the United States not having been controverted by Great Britain, and that Government having failed to produce any of the original orders to her naval officers, all of which orders are in her exclusive possession, these facts must be taken as admitted.

The conclusion of the reciprocity treaty of 1854 put this controversy at rest until 1866, when the treaty was terminated by the United States on notice given as therein provided. The provisions of this treaty superseded the treaty of 1818 in respect of the fisheries on the non-treaty coasts.^a

THE DECISIONS IN THE "WASHINGTON" AND "ARGUS" CASES.

There is one event of the first importance to be considered before this period is passed. February 8, 1853, the United States and Great Britain concluded a claims convention. The claims for damages arising from the seizure of the *Washington* and *Argus* were among those submitted to the joint commission created by that convention.

The commissioners for the two Governments disagreed in both of these cases, and they were referred to the umpire, who decided both claims in favor of the claimants, and sustained the contention of the United States as to the true interpretation of the renunciatory clause of the treaty.

The decisions of the umpire in the two cases are printed in full in the Case of the United States.^b

It will be recalled that the *Washington* was seized within the Bay of Fundy from six to ten miles from the shore, on the 10th of May, 1843, and that the *Argus* was seized in August, 1844, off the coast of Cape Breton, when, it was claimed, the vessel was within three miles of a line drawn from Cow Bay Head to Cape North.

^a U. S. Case, 133; Appendix, 26.

^b U. S. Case, 131-133.

It will also be recalled *that these seizures were the only ones ever made in the great bays when the vessels were beyond three miles from land, and that they were made for the specific purpose of "testing the question."*

The United States and Great Britain squarely presented the issue raised by these seizures to the joint commission and later to the umpire. The decision of the umpire was against the contention of the Government of Great Britain, and held that these large outer bays, similar to the Bay of Fundy and the bay formed by a line from Cow Bay Head to Cape North in Cape Breton, were not bays within the meaning of the treaty of 1818.

During the continuance of the reciprocity treaty of 1854, inasmuch as the inhabitants of the United States were by the terms of that treaty permitted to resort to all the inshore fisheries without any limitation as to the distance from shore, the question, presented and determined in the two cases of the *Washington* and *Argus*, was not the subject of controversy between the two powers, nor was it the subject of discussion between the provincial authorities and the Government of Great Britain, so far as the evidence discloses.

THE POSITION OF GREAT BRITAIN AFTER THE TERMINATION OF THE TREATY OF 1854.

On the termination of this treaty the American fishermen reverted to the provisions of Article I of the treaty of 1818 as the measure of their rights on the non-treaty coasts.

The Earl of Clarendon, in a note to Sir Frederick Bruce May 11, 1866, stated:

Her Majesty's Government are most desirous that the rights of the colonies should be so enforced as to give the least possible occasion for complaint or discussion. They have cordially approved and have recommended to the governments of the other British provinces a proposal made by the authorities of Canada that American fishermen should for the present season be allowed to enjoy under special licenses, the benefits conferred by the reciprocity treaty.^a

It is apparent from a note of Mr. Cardwell of the foreign office that the authorities of Nova Scotia were opposed to the policy of issuing licenses to the fishermen of the United States.^b The lieutenant-

^a U. S. Case, Appendix, 575.

^b U. S. Case, Appendix, 576.

ant-governor of Nova Scotia, Sir W. F. Williams, was, however, instructed by Mr. Cardwell:

I must distinctly inform you that on a matter so intimately connected with the international relations of this country, Her Majesty's Government will not be disposed to yield their own opinion of what it is reasonable to insist on, *nor to enforce the strict rights of Her Majesty's subjects beyond what appears to them to be required by the reason and justice of the case.*^a

The Province of Canada authorized the issuance of fishing licenses on the payment of a small sum entitling the holder to enjoy all rights granted the fishermen of the United States under the reciprocity treaty, which, of course, included the right to fish along the shores without regard to any distance therefrom.^b

In June, 1866, the foreign office was advised that Nova Scotia and New Brunswick would consent to the issuing of such licenses^c and in July, 1866, the Government of Prince Edward's Island agreed to the license system.^d

Under the British North America Act of March 29, 1867, the Provinces of Nova Scotia, New Brunswick, and Quebec federated with the Province of Canada, and thereafter the Government of the Dominion of Canada assumed authority over their coast fisheries.

The system of granting licenses continued until 1870.^e

The American fishermen gradually refused to apply for licenses, as the fee was considerably increased by provincial legislation above the fee established in 1866, and, as a result, difficulties began to arise concerning the rights of fishermen of the United States under the treaty of 1818.

In view of the position of Great Britain prior to the reciprocity treaty of 1854, and the decisions in the cases of the *Washington*, and *Argus*, it is here important to particularly note the attitude of the Government of Great Britain regarding the true interpretation and enforcement of this renunciatory clause.

In April, 1870, Mr. Fish asked Mr. Thornton, the British minister at Washington, for information as to whether or not it was the intention of the Dominion Government to issue any more licenses to foreign fishermen.^f

Mr. Thornton in a note to Mr. Fish, April 14, 1870, enclosed a memorandum from Sir John A. McDonald, prime minister of the

^a U. S. Case, Appendix, 577.

^d U. S. Case, Appendix, 579.

^b U. S. Case, 153; Appendix, 577.

^e U. S. Case, 138.

^c U. S. Case, Appendix, 578.

Dominion of Canada, showing that, by an order in council of the 8th January, 1870, the system of granting fishing licenses to foreign fishing vessels was discontinued, and that six suitable vessels, in addition to two already employed, were to be chartered and equipped for the purpose of protecting the Canadian inshore fisheries.^a

Special instructions were given to the commanding officers of these provincial cruisers in May, 1870.^b

The instructions, in reciting the powers and the jurisdiction of the officers, stated :

*Until further instructed, therefore, you will not interfere with any American fishermen, unless found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek (which is less than ten geographical miles in width). In case of any other bay, as Bay de Chaleurs, for example, you will not admit any United States fishing vessel or boat, or any American fishermen, inside of a line drawn across at that part of such bay where its width does not exceed ten miles. * * **

Be careful to describe the exact locality where the unlawful fishing took place, and the ship, vessel or boat was seized. Also corroborate the bearings taken, by soundings, and by buoying the place (if possible) with a view to actual measurement, and make such incidental reference to conspicuous points and land marks as shall place beyond doubt the illegal position of the seized ship, vessel or boat. *Omit no endeavor or precaution to establish on the spot that the trespass was the Lords of the Admiralty, April 12, 1866.*^c

This position of the Dominion of Canada, which now included, as already stated, the Provinces of Canada, New Brunswick, Nova Scotia, and Cape Breton, was a distinct departure from the abandoned claim of excluding American fishermen from all the large bodies of water adjacent to the British possessions in the North Atlantic, made by the Province of Nova Scotia prior to the position taken by Great Britain in 1845, that henceforward only those inlets of the sea which measured at their entrances double the distance of three miles were to be regarded as bays in the sense of the treaty, and prior to the decisions in the *Washington* and *Argus* cases.

The evidence now brought forward by the Government of Great Britain, establishes the fact that these instructions were based upon a letter from Mr. Cardwell, secretary of state for the colonies, to the Lords of the Admiralty, April 12, 1866.^d

The Government of Great Britain had formerly decided that the interpretation put upon the treaty by Nova Scotia, that every bay

^a U. S. Case, 148; Appendix, 580.

^b U. S. Case, 142-147; Appendix, 582.

^c U. S. Case, Appendix, 584.

^d British Case, Appendix, 221.

along the shores of the British possessions in North America was by the terms of the treaty denied the American fishermen, was not tenable, and now declined to enforce or contend for such a construction of the treaty.

Mr. Cardwell observed that "the question what is a British bay or creek is one which has been the occasion of difficulty in former years," and instructed the colonial authorities to conform to the arrangement made with France in 1839.^a

While in these instructions a British bay was only claimed to be one "which is less than ten geographical miles in width in conformity with the arrangement made with France in 1839," nevertheless, "in case it should become necessary to proceed to forfeiture, cases should, if possible, be selected for that extreme step in which the offence has been committed *within three miles of land*."

It will be recalled that, between the termination of the reciprocity treaty in 1866 and January, 1870, the provinces and the Dominion of Canada *granted licenses* to American fishermen to prosecute the in-shore fisheries without reference to any distance from shore. It is, therefore, to be observed what the position of Great Britain was when the terms of the treaty of 1818 were actually to be enforced against the people of the United States.

May 5, 1870, Vice-Admiral Wellesley was instructed by the Admiralty:

My lords desire me to remind you of the extreme importance of commanding officers of the ships selected to protect the fisheries, exercising the utmost discretion in carrying out their instructions, *paying special attention to Lord Granville's observation that no vessel should be seized unless it is evident and can be clearly proved that the offence of fishing has been committed and that the vessel is captured within three miles of land.*^b

April 30, 1870, Lord Granville, secretary of state for the colonies, in a note to Sir John Young, Governor-General of the Dominion of Canada, stated:

I have the honor to transmit to you the copy of a letter which I have caused to be addressed to the Admiralty respecting the instructions to be given to the officers of H. M. ships employed in the protection of the Canadian fisheries.

Her Majesty's Government do not doubt that your minister will agree with them as to the propriety of these instructions, and will give corresponding instructions to the vessels employed by them.^c

^a British Case, Appendix, 222.

^c U. S. Case, Appendix, 592.

^b U. S. Case, Appendix, 590.

The letter referred to by Lord Granville was the letter sent by direction of Lord Granville to the Admiralty April 30, 1870, instructing:

The officers of Her Majesty's ships employed in the protection of the fisheries that they are *not to seize any vessel unless it is evident and can be clearly proved that the offence of fishing has been committed and the vessel itself captured within three miles of land.*^a

Lord Granville, upon a consideration of the special instructions to the fisheries officers in command of the provincial cruisers, June 6, 1870, cabled Sir John Young, Governor-General of Canada:

Her Majesty's Government hope that the United States fishermen will not be for the present *prevented from fishing except within three miles of land or in bays which are less than six miles broad at the mouth.*^b

Following the request of Lord Granville, new instructions to the officers in command of the provincial vessels were issued under date June 27, 1870, which complied in every respect with the position of the Government of Great Britain:

In such capacity your jurisdiction must be strictly confined within the limit of three marine miles of any of the coasts, bays, creeks or harbors of Canada with respect to any action you may take against American fishing vessels, and United States citizens engaged in fishing. *Where any of the bays, creeks or harbors shall not exceed six geographical miles in width, you will consider that the line of demarcation extends from headland to headland, either at the entrance to such bay, creek or harbor, or from and between given points on both sides thereof at any place nearest the mouth where the shores are less than six miles apart; and may exclude foreign fishermen and fishing vessels therefrom or seize, if found, within three marine miles of the coast.* * * *

Until further instructed therefore, you will not interfere with any American fishermen unless found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which though in parts more than six miles wide, is less than six geographical miles in width at its mouth. In case of any other bay, as the Bay of Chaleurs, for example, you will not interfere with any United States fishing vessel or boat, or any American fishermen unless they are found within three miles of the shore. * * *

Omit no endeavor or precaution to establish on the spot that the trespass was or is being committed within three miles of land.^c

So it is observed the Government of Great Britain, when first called upon to enforce the treaty of 1818, after the termination of the reciprocity treaty, decided to issue instructions to its naval forces in the North Atlantic, in accord with the early orders, to only prevent fishing within three miles of land.

^a U. S. Case, Appendix, 591.

^b U. S. Case, Appendix, 609.

^c U. S. Case, Appendix, 613.

While making no reservation whatever in any communication to the United States in regard to the instruction to Canada to consider as bays, within the terms of the treaty, only those bodies of water less than ten geographical miles in width in conformity with the arrangement made with France in 1839, the Government of Great Britain did, however, give notice to the United States that the instruction to regard as bays within the terms of the treaty only those bays whose mouths exceed six miles in width must not be considered as constituting an arrangement between the two Governments.^a

The subject of creating a joint high commission to agree upon a series of lines separating the exclusive from the common right of fishing along the coasts of the British possessions had been broached by Mr. Seward in a note to Mr. Adams,^b who took the matter up with Lord Clarendon. Sir Frederick Bruce, the British minister at Washington, was advised that the plan was agreeable to the British Government, and, although not acted upon in 1866, was revived by the Earl of Kimberly in October, 1870.^c

The Earl of Kimberly advised the Governor-General of Canada that he had requested Lord Granville to transmit to Sir Edward Thornton, the British minister in Washington, a memorandum bearing upon the appointment of such a commission, and he enclosed a copy of the memorandum.

The memorandum shows conclusively that the Government of Great Britain did not support the contention originating with the officials of Nova Scotia, and was not prepared to advance the claim that there had been, prior to 1818, with the acquiescence of the United States, an assertion of jurisdiction over large bodies of water adjacent to the coasts of the British possessions in the North Atlantic:

The right of Great Britain to exclude American fishermen from waters within three miles of the coast is unambiguous and it is believed, uncontested. But there appears to be some doubt what are the waters described as within three miles of bays, creeks and harbors. When a bay is less than six miles broad, its waters are within the three mile limit, and therefore, clearly within the meaning of the treaty, *but when it is more than that breadth, the question arises whether it is a bay of Her Britannic Majesty's dominions.*

This is a question which has to be considered in each particular case with regard to international law and usage. When such a bay,

^a U. S. Case, Appendix, 610; British Case, Appendix, 239.

^b U. S. Case, 135; Appendix, 566.

^c U. S. Case, 147; Appendix, 628.

etc., is not a bay of Her Majesty's dominions, the American fishermen will be entitled to fish in it except within three miles of the coast. When it is a bay of Her Majesty's dominions, they will not be entitled to fish within three miles of it, that is to say (it is presumed) within three miles of a line drawn from headland to headland.

It is desirable that the British and American Governments should come to a clear understanding in the case of each bay, creek or harbor, what are the precise limits of the exclusive rights of Great Britain and should define those limits in such a way as to be incapable of dispute either by reference to the bearings of certain headlands or other objects on shore, or by laying the lines on a map or chart.^a

In 1871, the instructions issued by the Dominion of Canada to the officers in command of its provincial cruisers accorded with the decision of the Government of Great Britain in 1870.^b

THE NEGOTIATION OF THE TREATY OF WASHINGTON.

In January, 1871, Sir Edward Thornton, having received an instruction from Lord Granville, suggested in a note to the Secretary of State, that a complete understanding should be reached by the two Governments as to the extent of the rights in respect of the fisheries and as "to any other questions between them which affect the relations of the United States towards those possessions;" and proposed a joint high commission.^c

This suggestion of Lord Granville, and the subsequent notes exchanged between the two powers eventually led to the negotiations resulting in the treaty of May 8, 1871, known as the Treaty of Washington.^d

Article 18 of the Treaty of Washington extended to the inhabitants of the United States the benefit of all the inshore fisheries without limitation as to any distance from shore; and by Article 19 of the treaty, a similar liberty was extended on the sea-coasts and shores of the United States north of the thirty-ninth parallel of north latitude, to the subjects of Great Britain.^e

The treaty took effect July 1, 1873, and was made applicable to Newfoundland May 29, 1874.

^a U. S. Case, 148; Appendix, 629.

^b U. S. Case, 146; Appendix, 955.

^c U. S. Case, Appendix, 632.

^d U. S. Case, 158-159; Appendix, 28.

^e U. S. Case, Appendix, 29.

The fisheries articles of the treaty were to remain in force for the period of ten years from the date that they became operative, and further until the expiration of two years after either of the high contracting parties should give notice to the other of its decision to terminate such articles.

These articles were in effect a renewal of the fisheries provisions of the reciprocity treaty of 1854; but no provision was made for reciprocity in the exchange of products between the British possessions in North America and the United States, except that fish and fish oil of all kinds, the product of the other country, were to have free entry.

The fisheries articles of the treaty were terminated July 1, 1885, two years' notice having been given by the United States, but the fishing privileges under these articles were continued by mutual agreement until January 1, 1886.^a

During the continuance of these articles, no question directly bearing on the interpretation of the renunciatory clause was under discussion between the two Governments. Upon their termination, however, and the rights and liberties of the people of the United States in respect of the fisheries along the shores of the British possessions in North America again rested on the treaty of 1818 and were to be measured by its terms.

It has already been shown that the Government of Great Britain, after the termination of the reciprocity treaty in 1866, issued instructions in accord with the interpretation placed by the United States upon the renunciatory clause of the treaty of 1818, and that the orders issued by the Colonial Governments were brought in harmony therewith. It will also be of interest to note the position taken by Great Britain on this subject, in similar circumstances, upon the termination of the Treaty of Washington.

THE ORDERS ISSUED BY GREAT BRITAIN AFTER THE TERMINATION OF THE FISHERIES ARTICLES OF THE TREATY OF 1871.

In March, 1886, Lord Lansdowne, then Governor-General of Canada, notified Earl Granville that instructions had been issued by the department of marine and fisheries of Canada to the officers in com-

^a U. S. Case, 159.

mand of the vessels employed for the protection of the inshore fisheries of the Dominion, and added:

These instructions are substantially the same as those which were issued under similar circumstances in 1870.^a

The authorities of the Dominion of Canada, having at length in 1870 brought the instructions to their provincial cruisers into accord with the decision of the Government of Great Britain, as to the extent of the bays, creeks, and harbors referred to in the treaty of 1818, and having, as stated by Lord Lansdowne, re-issued the instructions of 1870 after the termination of the fisheries articles of the Treaty of Washington, now undertook to interfere with the American fishing vessels on entirely different grounds.

Following the termination of the fisheries articles, Mr. Bayard, the Secretary of State, in a note of May 20, 1886, to the British minister, stated with reference to the Canadian attitude toward American fishing vessels:

But I trust you will join with me in realizing the urgent and essential importance of restricting all arrests of American fishing vessels for supposed or alleged violations of the convention of 1818 within the limitations and conditions laid down by the authorities of Great Britain in 1870, to-wit: *That no vessel shall be seized unless it is evident and can be clearly proved that the offense of fishing has been committed and the vessel itself captured within three miles of land.*

In regard to the necessity for the instant imposition of such restrictions upon the arrest of vessels, you will, I believe, agree with me, and I will therefore ask you to procure such steps to be taken as shall cause such orders to be forthwith put in force under the authority of Her Majesty's Government.^b

Again, in a note to the British minister, dated May 29, 1886, the Secretary of State wrote:

I have also been furnished with a copy of circular No. 371, purporting to be from the customs department at Ottawa, dated May 7, 1886, and to be signed by J. Johnson, commissioner of customs, assuming to execute the provisions of the treaty between the United States and Great Britain, concluded October 20, 1818, and printed copies of a warning, purporting to be issued by George E. Foster, minister of marine and fisheries, dated at Ottawa, March 5, 1886, of a similar tenor, although capable of unequal results in its execution.

* * *

In the interest of the maintenance of peaceful and friendly relations, I give you my earliest information on this subject, adding that I have telegraphed Mr. Phelps, our minister at London, to make

^a U. S. Case, 186; Appendix, 756.

^b U. S. Case, Appendix, 770.

earnest protest to Her Majesty's Government against such arbitrary, unlawful, unwarranted and unfriendly action on the part of the Canadian government and its officials, and have instructed Mr. Phelps to give notice that the Government of Great Britain will be held liable for all losses and injuries to citizens of the United States and their property caused by the unauthorized and unfriendly action of the Canadian officials to which I have referred.^a

The Secretary of State addressed another note to the British minister on June 14, 1886:

It becomes my duty, in bringing this information to your notice, to request that if any such orders for interference with the unquestionable rights of the American fishermen to pursue their business without molestation *at any point not within three marine miles of the shores*, and within the defined limits as to which renunciation of the liberty to fish was expressed in the treaty of 1818, may have been issued, the same may at once be revoked as violative of the rights of citizens of the United States under convention with Great Britain.^b

Earl Granville, in a despatch, dated June 3, 1886, transmitted to Lord Lansdowne the protest, which the minister of the United States had made against the provisions of circular No. 371 above referred to; and subsequently, as a result of this protest, the circular was amended by substituting in place of the last clause the following:

Having reference to the above you are requested to furnish every foreign fishing vessel, boat, or fisherman found *within three marine miles from the shore*, within your district with a printed copy of the warning enclosed herewith. If any fishing vessel or boat of the United States is found fishing, or to have been fishing, or preparing to fish, or, if hovering *within the three-mile limit*, does not depart within twenty-four hours after receiving such warning, you will please place an officer on board such vessel and at once telegraph the facts to the fisheries department at Ottawa and await instruction.^c

Earl Granville in a note to Lord Lansdowne, dated July 15, 1886, acknowledged the receipt of a despatch setting forth the amendments to this customs circular and stated:

Her Majesty's Government observe with satisfaction the amendments which have been made in the customs circular No. 371, and in the warning to be given to the United States fishing vessels frequenting the waters of Canada.^d

The Earl of Rosebery, then Her Majesty's principal secretary of state for foreign affairs, on July 23, 1886, advised the British minister in the United States:

With regard to Mr. Bayard's observations in the same note respecting a customs circular and a warning issued by the Canadian au-

^a U. S. Case, Appendix, 774.

^b U. S. Case, Appendix, 789.

^c U. S. Case, Appendix, 791.

^d U. S. Case, Appendix, 801.

thorities, and dated respectively the 7th May and the 5th March last. *I have to acquaint you that these documents have now been amended so as to bring them into exact accordance with treaty stipulations; and I enclose, for communication to the United States Government, printed copies of these documents as amended.*^a

The Marquis of Salisbury, Her Majesty's principal secretary of state for foreign affairs, in a note to the American minister at London, March 24, 1887, replied to a note of Mr. Phelps, transmitting to Lord Salisbury's predecessor a despatch of Mr. Bayard proposing a settlement of the fisheries controversy, in which reply he stated that the subject had received the careful consideration of Her Majesty's Government, and the fullest examination by the authorities of the Dominion of Canada, and that—

Her Majesty's Government, and the Government of Canada, in proof of their earnest desire to treat the question in a spirit of liberality and friendship, *are now willing to revert for the coming fishing season, and if necessary, for a further term, to the condition of things existing under the treaty of Washington, without any suggestion of pecuniary indemnity.*

This is a proposal which, I trust, will commend itself to your Government as being based on that spirit of generosity and good will which should animate two great and kindred nations, whose common origin, language, and institutions constitute as many bonds of amity and concord.^b

As a result of subsequent correspondence, the two powers appointed plenipotentiaries, who met in Washington, and on February 15, 1888, concluded the unratified treaty known as the Bayard-Chamberlain treaty.^c

On the day, on which the proposed treaty had been signed, the British plenipotentiaries offered a *modus vivendi* pending the ratification of the treaty.^d

This *modus* was made effective for a period not exceeding two years, and extended to the fishing vessels of the United States, upon the payment of a license fee, commercial privileges, permitted the trans-shipment of cargo and the shipping of crews, and contained a provision suspending the necessity of entering or clearing at the custom-house, provided the vessel did not remain more than twenty-four hours and did not communicate with the shore. Forfeiture was to be exacted only for the offence of "fishing or preparing to fish in territorial waters."

^a U. S. Case, Appendix, 823.

^b U. S. Case, Appendix, 908-912.

^c U. S. Case, 202-205.

^d U. S. Case, 205; Appendix, 44.

This *modus*, although by its terms extending for a period of not exceeding two years, is still in effect in Canada.^a

The instructions issued by the department of marine and fisheries of Canada in March, 1886, were, it has been shown, "substantially the same as those which were issued under similar circumstances in 1870," and contained the order "to omit no precaution to establish on the spot that the trespass is or was being committed within three miles of *land*."

No instructions, based upon any other theory or interpretation of the renunciatory clause, were issued by Great Britain or the Dominion of Canada, prior to 1888; nor have any such instructions since been issued.

These instructions made it clear that neither of those Governments had any intention of attempting to interfere with the fishing vessels of the United States resorting to any waters adjacent to the British possessions in North America, outside the three mile limit, and outside bays, creeks, and harbors six miles or less in width.

No reservation as to a waiver of rights, similar to that made in 1870,^b or any other reservation, was made by the Government of Great Britain when the instructions were issued in 1886, and no reservation of any rights was, thereafter, made by Great Britain, by the Dominion of Canada, or by Newfoundland. On the contrary Mr. Bayard, the Secretary of State, referred to the acknowledged limit of three marine miles, and Lord Rosebery formally advised the United States that amendments to the circulars, apparently in conflict with the general instructions, had been made "so as to bring them into exact accordance with treaty stipulations," and he enclosed for communication to the United States Government printed copies of these documents as amended.^c

SUMMARY.

The essential facts of this controversy, as disclosed by the foregoing review may be summed as follows:

For more than twenty years after 1818 Great Britain construed this renunciatory clause as preventing American fishermen from ap-

^a U. S. Case, 206; British Case, 15.

^b British Case, Appendix, 239.

^c U. S. Case, Appendix, 823.

proaching, except for the purposes permissible under the terms of the treaty, within three miles of land or within a bay, the entrance of which did not exceed six miles in width.

During the years from 1841 to 1845 the Government of Great Britain discussed with the authorities of Nova Scotia their novel theory as to interpretation of the treaty and the extraordinary opinion of the law officers of the crown, but steadfastly refused to enforce the new theory against American vessels; and decided in 1845 "to regard as bays in the sense of the treaty only those inlets of the sea which measure from headland to headland at their entrance the double of the distance of three miles," but because of the protest of Nova Scotia the decision of Great Britain was not communicated to the United States.

From 1845 to 1854 American vessels exercised their rights and no orders in conflict therewith were enforced or issued.

Under the claims convention of 1853 the contention of the authorities of Nova Scotia was ruled against by the High Commission.

During the life of the treaty of 1854, covering the period to 1866, no question arose, inasmuch as the terms of the treaty extended to American fishermen greater rights on the non-treaty coasts than the United States held under the treaty of 1818.

From 1866 to 1870, licenses were issued by the provinces and the Dominion of Canada, admitting American vessels to all inshore fisheries with no limitation as to distance from the shores.

In 1866 the British Government, without reservation, instructed the provinces to regard as bays or creeks, within the meaning of the treaty of 1818, only those "less than ten geographical miles in width in conformity with the arrangement made with France in 1839."

In the years 1870 and 1871 the British Government issued instructions withdrawing opposition to fishing by Americans in all bays broader at their entrances than six marine miles so long as no vessel approached nearer than three miles to land, although the United States was notified that this action was not to be regarded as an arrangement between the two powers.

From 1871 to 1885 the right to the inshore fisheries, without any limitation, was enjoyed by American fishermen under the terms of the Treaty of Washington.

In 1886 orders were issued putting into operation, without reservation, the construction of this renunciatory clause now contended for by the United States and it was applied thereafter during another

period of more than twenty years. In the British Case^a the statement is made that "since 1888 the question has not been further discussed."

The controversy, in so far as it related to the true interpretation of this renunciatory clause, was thus settled in accordance with the contention of the United States.

The novel theory of interpretation, devised by Nova Scotia, has not been advanced by Great Britain since it was rejected over fifty years ago in the decisions of the *Washington* and *Argus* cases; and for the last thirty years it has not even been mentioned in the diplomatic correspondence. It may fairly be asserted, therefore, that this question was revived by Great Britain and submitted to this Tribunal on the theory that by proposing it something might be gained without the risk of losing anything, for a decision sustaining the contention of the United States would deprive Great Britain only of a barren claim which she has never felt justified in enforcing.

THE LAW APPLICABLE TO QUESTION FIVE.

There remains to state the principles of law applicable to the facts disclosed by this review and to cite the authorities bearing thereon.

The United States submits that the facts abundantly establish the true interpretation of this renunciatory clause of the treaty. The remedy agreed upon must be interpreted with the evil complained of in mind. Kent states: "The intention is to be collected from the occasion and necessity of the law, from the mischief felt, and the remedy in view, and the intention is to be taken or presumed according to what is consonant to reason and good discretion."

The United States contends that the intention of the negotiators, the remedy sought, the practical difficulties to be overcome, and the words of the treaty, all lead to the conclusion that a "bay of His Britannic Majesty's Dominions in America" was a bay lying within the three-mile line, following the sinuosities of all the non-treaty coasts; and that the three-mile distance was to be measured seaward from such bays as though the lines drawn from the opposite shores across their entrances were continuations of the shore-line.

^a British Case, 103.

It has been established that the Government of Great Britain abandoned all broad claims to extensive jurisdiction, in respect of the fisheries, over the waters adjacent to the coasts of the British possessions in North America, with the recognition of the independence of the United States in 1782; that under the provisions of the treaty of 1783, the right of American fishermen in the waters of all bays, creeks, or harbors, of whatever extent, in the North Atlantic was co-extensive with the rights of British subjects; that from the year 1783 until the close of the War of 1812 the Government of Great Britain never asserted any exclusive jurisdiction over bays, of whatever dimensions, against the fishing vessels of the United States, for such waters were subject to the common use of the fishermen of both countries and there was no opportunity, on the one hand, for the assertion of exclusive jurisdiction, or on the other, for the acquiescence in such assertion of jurisdiction; that, after the War of 1812, and prior to the treaty of 1818, there was no assertion by Great Britain of jurisdiction over all bays of whatever magnitude, but that the complaint was against the use of the shores, and against the invasion by American fishing vessels of waters lying along the shores of the British possessions within three marine miles from the shores.

The present position of Great Britain, in the Case presented to this Tribunal^a, is that the negotiators used the term "bays" without any qualification whatever, and that the inference is, therefore, irresistible that the term was intended to apply to all the waters which were known to the negotiators and to the public and were marked on the maps at the time as "bays;" and that if it had been intended that the term should apply only to a limited class of the waters which were then called "bays" an express limitation would have been inserted to give effect to that intention.

This position entirely disregards the intention of the negotiators, the remedy sought, the practical difficulties to be overcome, the actual construction of the treaty by both Governments for many years, the principles of international law, the word "coasts," and the limiting terms in the treaty.

It will be recalled that after the War of 1812 Great Britain only asserted jurisdiction, against the fishing vessels of the United States, over waters within three marine miles from the shores, and that the

^a British Case, 104.

term, "within the exclusive jurisdiction of Great Britain," "within the maritime limits," "within the British limits," "within the limits of the British sovereignty," were all used as including the territorial sea extending three marine miles from the shores; and it is manifest that, when the term "His Britannic Majesty's Dominions in America" was used following "bays, creeks or harbours", it imported, in any event, no extension of jurisdiction.

While there is no intention here of entering into any lengthy discussion of the various theories as to the nature of the right of a bordering state over the waters adjacent to its coasts, nevertheless, it is important to call to the attention of the Tribunal that the word "dominion", or the Latin word *dominium*, denotes a property right in the littoral sea, while the word "sovereignty," or the Latin word *imperium*, denotes a right to exercise sovereignty over the littoral sea, and the word "jurisdiction," or the Latin word *jurisdictio*, signifies the lesser right to exercise jurisdiction, which is only one of the prerogatives of sovereignty, over the littoral sea.

It is, therefore, apparent that of all the terms, "His Britannic Majesty's Dominions in America," "within the limits of the British sovereignty," and "within the exclusive jurisdiction of Great Britain," if the negotiators had in mind these distinctions, the words used denoted the narrowest claim in respect of extent of waters, although the broadest claim in respect of the nature of the right.

The attention of the Tribunal is now directed to the specific claim made by Great Britain, that the term "a bay of His Majesty's Dominions in America," inasmuch as no limitations were expressed in the treaty, "includes all tracts of water on the non-treaty coasts which were known under the name of bays in 1818."

The decisions of the High Commission, appointed under the Claims Convention of 1853, between the United States and Great Britain, in the cases of the *Washington* and the *Argus*,^a are decisive between the United States and Great Britain on this Question.

If, however, it were permissible for Great Britain to take the position advanced in the British Case and it should be sustained, it would furnish no rule for measurement. If "bays of His Britannic Majesty's Dominions in America" in 1818 were not confined to those bays lying "within the maritime limits," that is, landward of the three-mile line, and, therefore, to those six marine miles or less in

^a U. S. Case, 131-133; Appendix, 1101.

width at their mouths, there is no evidence from which to establish outside limits for any of these bodies of water. It is not shown in the evidence that any understanding existed in the minds of the negotiators, in the public mind, or in the minds of local fishermen or navigators as to any such limits. Is it to be inferred that outside limits would be, from time to time, determined by the local authorities as occasions required?

The British Case does not suggest any lines to be used as the base of measurement. It will not do to determine that the distance of three marine miles should be measured from lines without first having determined where such lines were agreed to be in 1818.

It seems apparent that, if the only definite rule—that is, that a “bay of His Britannic Majesty’s Dominions in America” was such a bay as lay landward of the three marine mile line drawn following the sinuosities of the shore—is disregarded, there are no fixed lines for measurement; for there was no other agreement on lines across the bays referred to. If the measurement was to be from some arbitrary line to be drawn across each bay on the non-treaty coasts, is it not reasonable to conclude that the Commissioners of the two powers would have agreed upon such lines, or at least upon a method for their determination; and would such an important question have been left open for future disputes and ultimate adjustment by another negotiation?

The United States submits that the facts establish that the true interpretation of this renunciatory clause of the treaty is in accordance with its position, and it further contends that the practice and usage of nations in 1818 was in harmony with the position of the United States.

If any uncertainty exists as to what waters were “bays, creeks, or harbours of His Britannic Majesty’s Dominions in America,” what was, in 1818, the decisive test, aside from the facts, by which the doubt can now be removed? In the absence of any long-continued assertion of jurisdiction, with the acquiescence of the United States, over any particular bodies of water, and no such assertions are found in the evidence, the sole test to be applied was the ability to defend the entrances to such bodies of water from the shores.

It is unnecessary to more than refer to the long contest for the freedom of the sea. The modern doctrine dates from Grotius, and Bynkershoek formulated it and promulgated the rule, which has

since governed the practice and usage of nations. In his great work *De Dominio Maris*, published in 1702, in chapter 2 (*Opera Omnia*, edition 1767, II, p. 127), he stated:

My opinion is that the territorial sea should extend only as far as it can be considered subject to the mainland. Hence I concede no further dominion over the territorial sea than that which can be exercised from the land; and there is no reason why a portion of the sea under the control and power of a state should not be called its property as well as any other body of water within its territory. It is, therefore, right to extend the land power and the right of dominion and possession as far as the range of cannon. I speak of our times, when cannons are in use; otherwise the general principle should be: the sovereignty of the land ends where the force of arms ends for this, as I said, is considered possession.

Later publicists and jurists applied this rule—*potestatem terræ finire, ubi finitur armorum vis*—and the test of a territorial bay, universally accepted by nations, came to be whether or not the entrance could be defended from the shores, unless the nation, sovereign of the surrounding shores, had long asserted an exclusive use and such use had been acquiesced in by other nations.

Vattel: *Le Droit des Gens*, published in 1758, citing from the edition of Pradier-Fordéré, 1863, vol. 1, section 291, p. 583:

All that we have stated regarding the parts of the sea which are adjacent to the coasts applies more particularly and with greater reason to roadsteads, bays, and straits, as being still more capable of occupation and more important to the safety of the country. But I speak of bays and straits of small extent, and not those large expanses of sea to which these names are sometimes given, such as Hudsons Bay and the Straits of Magellan, over which jurisdiction can not be extended, and still less ownership. A bay of which the entrance can be defended may be occupied and subjected to the laws of the sovereign; it is important that it should be so, since the country might be more easily insulted in that place than on the coasts exposed to the wind and to the impetuosity of the waves.

G. F. de Martens: *Précis du Droit des Gens moderne de l'Europe*, published in Latin 1785, French 1788, citing from vol. 1, French edition of Pinheiro-Ferreira, 1864:

SEC. 40. What has been said about rivers and lakes (that they are the property of the state) is equally applicable to straits and gulfs; above all to those which do not exceed the ordinary width of rivers or the double range of cannon.

Likewise, a nation may assume an exclusive right over those neighboring portions of the sea (*mare proximum*) susceptible of control from the shore. Different opinions have been expressed upon the distance to which the rights of the master of the shore extend. All

nations of Europe to-day agree that the rule is that straits, gulfs, and the adjacent sea belong to the owner of the shore, at least as far as the range of a cannon placed on the shore.

Klüber: *Droit des Gens moderne de l'Europe*, published in 1819, citing from French Edition, 1874, section 130-131:

Within the maritime territory of a state are included those maritime districts or regions susceptible of exclusive possession over which the state has acquired (by occupation or convention) and retained sovereignty. To these districts belong: (1) Those parts of the ocean which are adjacent to the continental territory of a state, in accordance with almost universally adopted opinion, as far as they are within the range of a cannon placed on the shore; (2) those parts of the ocean which extend into the continental territory of a state, if they can be commanded by cannon from the two shores, or the entrance of which may be forbidden to vessels; that is, gulfs, bays, and creeks: * * * (4) gulfs, straits, and seas adjacent to the continental territory of a state, which, although not entirely within the range of cannon shot, are recognized by other powers as closed seas subjected to the domination of one state.

Ortolan: *Diplomatie de la Mer*, published in 1844, citing from vol. 1, edition of 1853, page 150 et seq.:

The causes which interfere with the existence of the right either of property or of sovereignty are not found absolutely over all portions of the sea. There are certain parts close to the land, partaking in some respects of its condition, in which these causes cease more or less to exist and in which consequently these rights may exist in whole or in part. In this connection, far from being exceptions to the principles which constitute the liberty of the open sea, they are confirmations of it; the cause ceasing, the effect must cease, logically. The recognition of maritime domains subject to the property or sovereignty of a nation is deduced from the very principles upon which are based the general liberty of the seas.

Property or domain must not be confused with sovereignty or the right of command or of jurisdiction.

In this connection we must define first, ports and roadsteads; second, gulfs and bays; third, straits and certain inclosed seas; fourth, portions of the sea adjacent to the coast of the state.

Ports and roadsteads are fully susceptible of possession and the proprietary state may use all the means incident to the right of possession. This proprietorship over ports and roadsteads does not prevent other nations from freely navigating or communicating with them.

The nation that is mistress of the port or roadstead may, at its pleasure, declare them closed, open, or free; that is to say, permit or forbid access to them or subject imports to certain fiscal laws or permit free entry.

We must classify under the same heading as roadsteads and ports, gulfs and bays and all other indentations known by other denominations when these indentations made in the land of a single state do not exceed in width the double range of cannon or when the en-

trance may be controlled by artillery or when it is naturally defended by islands, banks or rocks. In all of these cases it may truly be said that these indentations or bays are within the power of the state which is mistress of the territory which surrounds them. This state has the possession thereof; all the reasons which we have adduced with respect to roadsteads and ports may be repeated here. * * *

The border of the sea which washes the coast of a state constitutes the natural maritime limits to that state, but for the protection and more effective defense of these natural limits the general custom of nations in accordance with public treaties, permits imaginary lines to be traced along the coast at a suitable distance following its sinuosities, which may be considered as the artificial maritime boundary. Every ship which finds itself inside of this line is said to be *in the waters* of the state whose right of sovereignty and jurisdiction it limits. This imaginary line Pinheiro-Ferreira calls "the line of respect," and within which he says with reason "the alien even in the absence of force must conduct himself as if he were upon the territory of the state, and undertake nothing which the government of that state would have the right to pronounce as infringing the ownership or security of the nation."

The greatest range of cannon, according to the ordinary progress of the art at each epoch, is therefore the best universal measure to adopt. There is no question that the measurement of the distance commences at the point where there is actual navigable sea. The rule which Bynkershoek gives, *terrae potestas finitur ubi finitur armorum vis*, is to-day the rule of the law of nations, and since the invention of firearms this distance has ordinarily been considered as three miles.

Nevertheless, with respect to this limitation of the territorial sea, two observations may be made: First, the greatest range of cannon is the common standard of measurement adopted by the universal law of nations, which must be observed by all in the absence of treaty; but nothing would prevent certain powers from agreeing among themselves by treaty, upon a different extent of the territorial sea. The extension thus established would, however, be obligatory only on the contracting powers, other powers remaining subject to the common rule. Our opinion, moreover, is that these special treaties, while substituting a more definite measurement in precise figures for that of the range of cannon, ought not to digress far from this latter standard, the danger being of opposing the principles of reason upon which the special control over the territorial sea is based.

Hautefeuille: "*Des Droits Et Des Devoirs des Nations Neutres en Temps de Guerre Maritime*," published in 1848, citing from vol. 1, French edition, 1868, tit. I, ch. 3, p. 57 et seq.

The sea is absolutely free except the waters washing the coast. These waters are part of the domain of the adjacent state. The reasons for this exception are: 1st. That these portions of the ocean are susceptible of a continuous possession; 2nd. That the people which possess them may exclude others from them; 3rd. That in the interest of its security and the preservation of the advantage derived from the territorial sea, it must establish this exclusion. These causes

known, it is easy to fix the limitations. The maritime dominion ends where continuous possession ends, where the proprietary state can no longer exercise its power, at the place at which it can no longer exclude foreigners and finally at the place where, their presence no longer endangering its security, it no longer has any interest in excluding them.

Now, the point at which the three causes which render the sea susceptible of private possession ceases, is the same for all; it is the limit of its power represented by instruments of war. The space covered by projectiles discharged from the shore protected and defended by the power of these engines is territorial domain, and subjected to the dominion of the master of the shore. The greatest range of cannon placed on shore is actually, therefore, the limit of the territorial sea.

In fact, this space alone is actually subject to the power of the territorial sovereign; there and there alone can he enforce his laws. He has the power to punish malefactors and to exclude those he desires. Within this limit the presence of foreign vessels may threaten his security; beyond it, their presence is a matter of indifference to him, it can cause him no anxiety for beyond the cannon range they can not harm him. The limit of the territorial sea is actually, according to primitive law, the range of a cannon placed on shore.

Secondary law has sanctioned this rule; the majority of treaties on the subject have adopted the same rule. Grotius, Hübner, Bynkershoek, Vattel, Galiani, Azuni, Klüber and almost all modern publicists of greatest authority, have taken the range of cannon as the only limit of the territorial sea which was rational and in conformity with principles of primitive law. This natural limit has been recognized by a great number of states in their municipal laws and regulations. (See footnote, vol. 1, p. 58.)

It is important to note that to preserve their domain over the territorial sea it is not necessary for the adjacent state to erect fixed and permanent batteries, fortresses, etc., nor that its cannon be at all times ready to cover all parts of this sea with their fire. The absence of these means of coercion, either temporary or permanent—for all parts of the shore can not be armed—does not interfere with the right itself nor change the limits which we have just assigned. The nation, sovereign of the land washed by the tide, is by that fact alone sovereign of the territorial sea and exercises its rights over its land and sea dominion as best serves its interests, the mode of exercise in no way diminishing its actual right.

The sea coasts do not present a straight and regular line. They are on the contrary almost always cut by bays, capes, etc. If the maritime domain were always to be measured from every point of the coast, great inconveniences would result. Thus it is agreed by usage to draw an imaginary line from one headland to another and to take this line as the point of departure for the range of cannon-shot. This method adopted by almost all states, applies to small bays only and not to gulfs of wide extent like the Gulf of Gascoigne and the Gulf of Lyon, which in fact are great portions of sea entirely open and whose complete assimilation to the high sea it is impossible to deny.

Sir Robert Phillimore, in his work on *International Law*, published in 1854, citing from 3rd Edition, London, 1879, vol. 1, page 274, in discussing those portions of the sea subject to the rights of property or jurisdiction states:

Though the open sea be thus incapable of being subject to the rights of property or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to *certain portions* of the sea.

And first with respect to that portion of the sea which washes the coast of an independent state. Various claims have been made, and various opinions pronounced, at different epochs of history, as to the extent to which territorial property and jurisdiction may be extended. But the rule of law may be now considered as fairly established—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a Treaty or an unquestioned usage, beyond a marine league (being three miles) or the distance of a cannon-shot, from the shore at low tide:—"quousque e terra imperari potest,"—"quousque tormenta exploduntur,"—"terræ dominium finitur ubi finitur armorum vis,"—is the language of Bynkershoek. "In the sea, out of the reach of cannon-shot" (says Lord Stowell), "universal use is presumed." This is the limit fixed to absolute property and jurisdiction; but the rights of independence and self-preservation in times of peace have been judicially considered to justify a nation in preventing her revenue laws from being evaded by foreigners beyond this exact limit; and both Great Britain and the United States of North America have provided by their municipal law against frauds being practiced on their revenues, by prohibiting foreign goods to be transshipped within the distance of four leagues of the coast, and have exercised a jurisdiction for this purpose in time of peace. These were called the Hovering Acts.

Again at page 276, "the limit of territorial waters has been fixed at a marine league, because that was supposed to be the utmost distance to which a cannon-shot from the shore could reach. The great improvements recently affected in artillery seems to make it desirable that this distance should be increased, but it must be so by the general consent of nations by specific treaty with particular States."

The extract cited in the British Case ^a from Phillimore is taken from the following paragraph and, if separated from it, does not present the views of the author:

Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea, which, though they exceed this verge, may, under special circumstances, be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are enclosed but not entirely surrounded by lands belonging to one and the same state. With respect to bays and gulfs so enclosed, there

^a British Case, 118.

seems to be no reason or authority for a limitation suggested by Martens, "surtout en tant que ceux-ci ne passent pas la largeur ordinaire des rivières, ou la double portée du canon,"—or for the limitation of Grotius which is of the vaguest character, "mare occupari potuisse ab eo qui terras ad latus utrumque possideat, etiamsi aut supra pateat ut sinus, aut supra et infra ut fretum, dummodo non ita magna sit pars maris ut non cum terris comparata portio earum videri possit." The real question, as Günther truly remarks is, whether it be within the physical competence of the nation, possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded; or, as Martens declares in his earliest, and in some respects best, treatise on International Law, "Partes maris territorio ita natura vel arte inclusæ ut *exteri aditu impediri possint*, gentis ejus sunt, cujus est territorium circumjacens." To the same effect is the language of Vattel: "Tout ce que nous avons dit des parties de la mer voisines des côtes, se dit plus particulièrement et à plus forte raison des rades, des baies et des détroits, comme plus capables encore d'être occupés, et plus importants à la sûreté du pays. Mais je parle des baies et détroits de peu d'étendue, et non de ces grands espaces de mer auxquels on donne quelquefois ces noms, tels que la baie de Hudson, le détroit de Magellan, sur lesquels l'empire ne saurait s'étendre, et moins encore la propriété. Une baie dont on peut défendre l'entrée, peut être occupée et soumise aux lois du souverain; il importe qu'elle le soit, puisque le pays pourrait être beaucoup plus aisément insulté en cet endroit que sur des côtes ouvertes aux vents et à l'impétuosité des flots."^a

Phillimore here clearly establishes as his opinion that—

The real question as Günther truly remarks, is whether it be within the physical competence of the nation possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded.

Phillimore, then, is certainly not an authority for the claim that all bays, gulfs, and estuaries, whatever their width, belong to the state possessing their shores. He makes the test, whether it be within the physical competence of the nation possessing the surrounding land, to exclude other nations.

De Cussy: *Phases et Causes Célèbres du Droit Maritime des Nations*, published in 1856, vol. I, section 40, page 91, et seq:

But the protection of the territory of a nation and its shore fishing, which is the chief resource of the inhabitants of the coast region have shown the necessity of recognizing a maritime territory, or, better still, a territorial sea, belonging to every nation bordering on the sea; that is to say, some distance from the shore which might be considered as a continuation of the territory and over which the state sovereignty of each maritime nation might extend. * * * Although the extent of the property or sovereignty over the territorial sea still appears to present some uncertainty, it does not exist

^a British Case, 284.

to the extent indicated by the observations of Rayneval. Does not a common opinion of statesmen as well as modern publicists exist, in view of the treaties which we have cited, and the local legislation which we have adduced, and the doctrine expressed by Grotius, Valin, Azuni, Klüber, and so forth, decide it? Can we not say with certainty: (1) That the sovereignty over the territorial sea reaches as far as the range of cannon shot from the shore, so far as concerns the protection which a neutral state owes to vessels of a belligerent nation; but the surveillance which ought to be exercised in the matter of customs to prevent smuggling may extend still farther; (2) this sovereignty extends over maritime regions, such as roadsteads, bays, gulfs, and straits, whose entrance and exit may be defended by cannon.

Section 41, p. 97. All gulfs and straits cannot belong throughout their entire extent to the territorial sea of the state whose coasts they wash. The sovereignty of the state is limited over gulfs and straits of wide extent to the distance indicated in the foregoing paragraph; beyond this, gulfs and straits of this category are assimilated to the sea and their use is free to all nations.

Fiore: *Nouveau Droit International Public*, published in Italian in 1865, citing from French translation by Antoine of 2nd edition (1885):

SEC. 804. This state of things being admitted we must, in proposing a practical rule, subscribe to the opinion expressed by Calvo, who is of the opinion that so long as we shall not have determined the extent of the maritime frontier, nor come to a decision admitted by the majority of States, the delimitation of three marine miles constitutes from an international point of view a fixed rule which ought to be observed and respected in every case where treaties have not established another rule. (Calvo, Section 344.)

SEC. 808. The principles which we have just expounded with reference to the territorial sea are equally applicable to bays and gulfs. These latter cannot be considered as being within the domain of the territorial sovereignty, unless their extent is so restricted that their waters are entirely within the range of cannon-shot from the shore. * * *

Calvo: *Le Droit International Theorique et Pratique*, published in Spanish, 1868, citing from 5th edition in French 1, 1896:

SEC. 353. * * *

The natural limit of a state on the coast is defined by the contour of its shores where they are washed by the tide and where the maritime dominion begins. In order to facilitate the defense of the coast, the general practice of nations sanctioned by numerous treaties, has been to trace, at a certain distance from the land, an imaginary line which is considered to form the extreme limit of the maritime frontier of each country. All the space within this line comes, *ipso facto*, under the jurisdiction of the state to which it belongs, and the sea between this line and the shore is called territorial waters.

SEC. 367. Gulfs and bays protected either naturally by islands, sand bars, or rocks, or by the cross fire of guns placed on each side of their entrances, belong to the territorial sovereignty adjoining. As regards liberty of access and jurisdictional law they are regulated

by the same principles as those which we have just established for inner harbors and roadsteads.

Pradier-Fodéré; *Traité de Droit International Public*, published in 1885, vol. 2, Sec. 661.

* * * The rule generally expressed and moreover observed by all states is that bays and gulfs are unquestionably a part of the territorial sea unless they have such an extent that it is impossible to defend their entrance from the shore. All the curvatures surrounded by the lands of a single state when their width does not exceed the double range of a cannon shot or when their entrance may be controlled by artillery, or when they are naturally defended by islands, lakes, or rocks, are considered as constituting a part of the adjacent state and as accessories to the land. "In all cases, says Ortolan, "it is correct to say that these gulfs and bays are within the territory of the state that is master of the lands which surround them." It has the physical power to continuously operate within these waters; except for conventions either express or tacit it may exclude ships of war of every other state from it, and this right is based upon the reciprocal independence of peoples which authorized them to judge for themselves of the manner in which this right is to be exercised. We may add to these reasons justifying the right of sovereignty of the state over gulfs and bays, the consideration that these indentations form a safe anchorage, because the adjacent coasts break the currents and waves and shelter vessels against the impetuosity of the winds. So that ships which anchor there are under the protection of the shores and consequently under the protection of their sovereign, whose sovereignty they must recognize as soon as they place themselves under its control. Thus, bays and gulfs are considered as comprised within the domain of the territorial sovereign if their extent is not such that it is impossible to defend their entrance from the shore, in other words if they may be defended either by maritime force, by the cross fire of cannons placed at their entrance, or naturally by rocks, sand-banks, islands, etc. But the principle of the liberty of the seas is not to be modified with reference to bays and gulfs of wide extent. We must apply to them the principles set forth with reference to the territorial sea.

Testa: *Le Droit Public International Maritime*, published in Portuguese, citing from the French edition, 1886, p. 67 et seq.

Gulfs and Bays. The considerations above advanced apply equally to gulfs and bays whose shores belong to the same power when the entrance or mouth is not so wide as to be unable to be commanded by the crossfire of artillery, or when they are naturally defended by islands, banks or reefs, which render their permanent or effective possession possible.

We must, therefore, except from this category gulfs and bays of wide extent, which, in spite of their names, which they derive from their geographical configuration, are portions of the high seas. Here we include the Gulf of Biscay, the Gulf of Guinea, of Lyon, etc., which by their condition cannot be subjected to the jurisdiction, much less to the property of the state whose shores they wash. * * *

Piedelièvre: *Précis de Droit International Public ou Droit des Gens*, published in 1894, vol. I, Section 417:

Are gulfs or bays, or considerable portions of the sea which encroach upon the land, to be considered as subject to the territorial sovereignty of the adjacent state? The general rule makes them part of the territorial sea when their extent is such that it is not impossible to defend their entrance from the shore; that is to say, they are under the sovereignty of the riparian state when they do not exceed in width the double range of cannon placed on the shore, or when their entrance may be protected by artillery, or is naturally protected by islands, banks, or rocks. In all these cases it is evident that gulfs and wide bays are within the control of the state proprietor of the land which encloses them. This state has the actual possession.

As to gulfs or bays which do not fulfill one or the other of these conditions, they are free as the sea of which they constitute a natural part, except that portion corresponding to the marginal sea of the adjacent state, which is subject to the principles heretofore enunciated.

Professor Westlake, long Whewell Professor of International Law in the University of Cambridge, in his *International Law*, vol. I, p. 187-88, states:

As to bays, if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question—that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth—there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the state will be measured outwards from that line to the distance, three miles or more, proper to the state. But although this is the general rule, it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the states into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit to such appropriation. Examples are the Bay of Conception in Newfoundland, penetrating forty miles into the land and being fifteen miles in average breadth, which is wholly British, Chesapeake and Delaware Bays, which belong to the United States, and the Bay of Cancale, seventeen miles wide, which belongs to France. Similar exceptions to those admitted for gulfs were formerly claimed for many comparatively shallow bays of great width for example those on the coast of England from Orfordness to the North Foreland and from Beachy Head to Dunnose, which, together with the whole of the Bristol Channel and various other stretches of sea bordering on the British Isles, were claimed under the name of the King's Chambers. But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid

ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage. It is sometimes said and may be historically true that all sovereignty now enjoyed over the littoral sea or certain gulfs is the remnant of the vast claims which, as we have seen, were once made to sovereignty over the open sea, and which it is held have been gradually reduced to a tolerable measure through such intermediate stages as that of the King's Chambers; and the impossibility of putting the claim to gulfs in a definite general form may be thought favourable to that view. None the less however the rights which are now admitted stand on a basis clear and solid enough to distinguish and support them.

Professor T. E. Holland, Chichele Professor of International Law at Oxford, in a collection of letters to the "Times" upon "*War and Neutrality*," published in book form in 1909, discussed, at page 132, this subject of territorial waters. Professor Holland was evidently commenting on views lately expressed by Admiral de Horsey.

Most authorities would, I think, agree with Admiral de Horsey that the line between "territorial waters" and "the high seas" is drawn by international law, if drawn by it anywhere, at a distance of three miles from low water mark. In the first place the ridiculously wide claims made, on behalf of certain states, by mediæval jurists were cut down by Grotius to so much water as can be controlled from the land. The Grotian formula was then worked out by Bynkershoek with reference to the range of cannon; and, finally, this somewhat variable test was, before the end of the eighteenth century, as we may see from the judgments of Lord Stowell, superseded by the hard-and-fast rule of the three-mile limit, which has since received ample recognition in treaties, legislation and judicial decisions.

The subordinate question, also touched upon by the Admiral, of the character to be attributed to bays, the entrance to which exceeds six miles in breadth, presents more difficulty than that relating to strictly coastal waters. I will only say that the Privy Council, in *The Direct U. S. Cable Co. v. Anglo-American Telegraph Co.* (L. R. 2 App. Ca., 394) carefully avoided giving an opinion as to the international law applicable to such bays, but decided the case before them, which had arisen with reference to the Bay of Conception in Newfoundland, on the narrow ground that, as a British court, they were bound by certain assertions of jurisdiction made in British Acts of Parliament.

The three-mile distance has, no doubt, become inadequate in consequence of the increased range of modern cannon, but no other can be substituted for it without express agreement of the Powers. One can hardly admit the view which has been maintained, e. g. by Professor de Martens, that the distance shifts automatically in accordance with improvements in artillery. The whole matter might well be included among the questions relating to the rights and duties of neutrals, for the consideration of which by a conference, to be called at an early date, a wish was recorded by The Hague Conference of 1899.

Other publicists, jurists and authorities for this doctrine are: Neyron, Azuni, Heffter, Sir Travers Twiss, Fiore, Gessner, Funck-Brentano & Sorel, Hall, Ferguson, Rivier, Despagnet, Liszt, Nys, Oppenheim, Supreme Court of Massachusetts, Supreme Court of the United States.^a

The position of Great Britain in the Fur Seal Arbitration in 1893 and before the Alaskan Boundary Tribunal in 1903 is inconsistent with its present position.^b

It being determined that, in the absence of any assertion of jurisdiction based upon long-continued usage with the acquiescence of other powers, or some agreement by treaty extending the territorial jurisdiction of the adjacent state, the power to defend was the sole test of a territorial bay, there remains only to be determined what distance was the limit of defense in 1818.

It is a matter of common knowledge that the limit of cannon range in 1818 was approximately three marine miles and cannon-shot and three marine miles came to be identified as the rule of measurement.

Azuni, writing in 1795 (citing from the American edition of 1806 of his work, *The Maritime Law*, p. 205), stated:

It would be reasonable then, in my opinion, without inquiring whether the nation in possession of the territory has a castle or battery erected in the open sea, to determine definitively that the territorial sea shall extend no farther than three miles from the land, which is, without dispute, the greatest distance to which the force of gunpowder can carry a ball or bomb.

^a Neyron: *Principes du Droit des Gens Européen Conventionnel et Coutumier*, published at Brunswick, 1783, p. 239; G. F. de Martens: *Précis du Droit des Gens Moderne de l'Europe*, published in 1785, French edition of Pinheiro-Ferreira, 1864, sections 40-42, 153; Azuni: *The Maritime Law of Europe*, part 1, ch. 2, art. 3, sec. 17, published in 1796, American edition (1806), vol. 1, pp. 221-2; part 1, ch. 2, art. 2, sec. 15, p. 205; part 1, ch. 3, art. 1, sec. 5, p. 225; Heffter: *Le Droit International de l'Europe*, published in 1844, French edition 1883, secs. 75-76, p. 171 et seq.; Sir Travers Twiss: *Law of Nations*, published in 1861, edition of 1884, p. 292 et seq., p. 295; Fiore: *Nouveau Droit International Public*, published in Italian, 1865, French translation by Antoine of second edition, 1885, secs. 801-3, 808-9; Gessner: *Le Droit des Neutres sur Mer*, published in 1865, p. 16 et seq.; Funck-Brentano and Sorel: *Précis du Droit des Gens*, published in 1877, edition of 1900, p. 375; Hall: *International Law*, published in 1880, fifth edition 1904, p. 150 et seq.; Ferguson: *Manual of International Law*, published in 1884, vol. 1, p. 397; Pradier-Fodéré: *Traité de Droit International Public*, published in 1885, vol. 2, sec. 661; Rivier: *Principes du Droit des Gens*, published in 1896, vol. 1, p. 153; Despagnet: *Cours de Droit International Public*, published in 1894, second edition, 1899, secs. 413, 415; Liszt: *Das Völkerrecht*, published in 1898, edition of 1907, p. 91; Westlake: *International Law*, published in 1904, vol. 1, p. 184 et seq.; Nys: *Le Droit International*, published in 1904, vol. 1, p. 446; Oppenheim: *International Law*, vol. 1, pp. 246, 241, 247, 333; *Manchester vs. Massachusetts*, Supreme Court of the United States, vol. 139, U. S. Reports, p. 240; *Commonwealth vs. Massachusetts*, Supreme Court of Massachusetts Reports, vol. 152, p. 230.

^b *British Case*, Fur Seal Arbitration; *British Counter Case*, Alaskan Boundary Tribunal.

Lord Stowell, in 1801, in the case of the *Twee Gebroeders*, 3 Rob., 336-9, held:

In the sea, out of the reach of *cannon-shot universal use is presumed*. * * * Portions of the sea are prescribed for; so are rivers flowing through contiguous states. * * * But the general presumption certainly bears strongly against such exclusive rights and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence.

The same authority, in delivering the opinion in 1800, in the *Twee Gebroeders, Alberts, Master*, 3 Rob., 162-3, said:

She was lying in the eastern branch of the Eems, within what may I think be considered as a distance of *three miles* at most from East Friesland. * * * I am of opinion that the ship was lying within *those limits*, in which all direct hostile operations are by the *law of nations* forbidden to be exercised.

Heffter: *Le Droit International de l'Europe*, published in 1844, French edition of 1883, section 75:

Common usage has established the range of cannon as the distance within which it is not lawful to trespass, except in exceptional cases; a line of limitation which not only has obtained the support of Grotius, Bynkershoek, Galiani, and Klüber but has likewise been established by the laws and regulations of many nations. * * * Now it is considered ordinarily as three marine miles.

Sir Robert Phillimore in his *Commentaries upon International Law*, first published in 1854 (citing from edition of 1879, vol. I, page 274), stated:

But the rule of law may be now considered as fairly established—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a treaty or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon shot from the shore at low tide:—"quousque e terra imperari potest,"—"quousque tormenta exploduntur,"—or "terrae dominium finitur ubi finitur armorum vis,"—is the language of Bynkershoek. "In the sea, out of the reach of cannon shot (says Lord Stowell), universal use is presumed." This is the limit fixed to an absolute property and jurisdiction.

Sir Travers Twiss in his work on *The Law of Nations*, published in 1861 (citing from the edition of 1884, page 292), said:

Upon this principle a neutral nation is held to be entitled to preclude belligerent powers from carrying on mutual hostilities upon the open sea within a certain distance of its coast. That distance as between nation and nation is held to extend as far as the safety of a nation renders it necessary and its power is adequate to assert it; and, as that distance can not with convenience to other nations, be a variable distance depending upon the presence or absence of an

armed fleet, it is by practice, since the introduction of firearms, identified with that distance over which a nation can command obedience to its empire by the fire of its cannon. That distance, by consent, is now taken to be a maritime league seaward along all the coast of the nation. Beyond the distance of a sea league from its coasts the territorial laws of a nation are, strictly speaking, not operative.

Calvo: *Le Droit International Theorique et Pratique*, published in 1868, French edition of 1896, section 356:

From these general principles it is easy to draw the conclusion that territorial waters should include only the space capable of being defended from the mainland or as serving as a base for attacks on the adjacent coast. Since the invention of fire arms this space has generally been limited to three nautical miles from the shore line at low tide. In this zone the exercise of territorial sovereignty is absolute, uncontested and exclusive of the rights of all other nations.

Hall, in his *Treatise on International Law*, published in 1880 (citing from the fifth edition, 1904, page 154), said:

In any case the custom of regarding a line three miles from land as defining the boundary of the marginal territorial waters is so far fixed that a state must be supposed to accept it in the absence of express notice that a larger extent is claimed.

Pradier-Fodéré: *Traité de Droit International Public*, published in 1885, vol. 2, section 631:

As a matter of fact, the question of the extent of the territorial sea is established by the usage of states and by conventions. Thus, a common usage has established the range of cannon shot as denoting the space designated by the name territorial sea, and this custom has been fixed by laws and regulations of many states as well as by conventional law. We may, therefore, consider the formula of Bynkershoek that the sovereignty of the land ends where the force of arms ends as having to-day become the general rule of international law.

Sec. 633. If the distance of three geographical miles, calculated from low-water mark, in a way forms accepted law, nothing prevents states from fixing, among themselves, by treaty, a different limit to the territorial sea. But the extent thus fixed is clearly only obligatory upon the contracting parties, and other powers not parties to the treaty, or who have not admitted it, remain subject to the common law.

Fiore: *Le Droit International Codifié*, published in 1890, section 205:

The territorial sea embraces the waters washing the coast of a state to a distance determined by the necessities of defense, by the need of guaranteeing the security of the territory and safeguarding the interests of the commerce of the state. By customary law the territorial sea extends to three miles from low water mark.

Professor L. Oppenheim, Whewell Professor of International Law at Cambridge, in his work on *International Law*, vol. 1, page 241, says:

Since at the end of the 18th century the range of artillery was about three miles or one marine league, that distance became generally recognized as the breadth of the maritime belt.

It is certain that, whether the customary law of nations in 1818 was that the range of cannon or three marine miles was the limit of the territorial sea, Great Britain and the United States had identified before 1818 the cannon-shot rule with the three-mile rule.^a

AUTHORITIES AND PRECEDENTS REFERRED TO IN THE BRITISH CASE.

The opinions of jurists and publicists, relied upon in the British Case to establish that the usage of nations is inconsistent with the position of the United States, including Phillimore, Hall, Azuni, Bluntschli, Vattel, and Hautefeuille, have been cited, with many others, in this argument as supporting the view of the United States. An examination of these authorities will disclose that their opinions support the position of the United States.

The United States does not deny that special agreements between various powers have been entered into providing that all bays which do not exceed ten miles in width are territorial bays; and that such treaties or agreements are binding upon the nationals of the signatory powers. The convention of August 2, 1839, between Great Britain and France; the convention of 1867, between the same powers; the agreement between Great Britain and Germany in 1874; the similar agreement between the German and the Danish Governments in 1880; the North Sea Fisheries Convention of May 6, 1882, were all extensions of the territorial sea, and were so regarded.

The proceedings of the Institute of International Law in 1894, show that the opinion of that learned body, that the maritime belt

^a Lord Stowell: *Twoe Grebroeders*, 3 Rob., 162-3; 336-9; *The Anna*, 5 Rob., 373; Unratified Treaty of 1806, U. S. Counter Case Appendix, 22; Note from Mr. Jefferson to M. Genet, Minister of France in United States, British Case Appendix, 56; Note from Mr. Jefferson to Mr. Hammond, British Minister in the United States, British Case Appendix, 57; Extract from note of Mr. Adams to Mr. Monroe, stating conversation with Lord Bathurst, British Case Appendix, 65; Note from Mr. Adams to Lord Bathurst, British Case Appendix, 67; Note from Lord Holland and Lord Auckland to Lord Howick, British Case Appendix, 61; Note from Messrs. Monroe and Pinkney to Mr. Madison, Secretary of State, U. S. Counter Case Appendix, 96; Treaty between United States and Great Britain, February 29, 1892, U. S. Compilation of Treaties in Force, 1904, 355; Award of Tribunal of Arbitration under treaty of February 29, 1892, U. S. Compilation of Treaties in Force, 1904, 357.

should be extended to six miles and the width of territorial bays to twelve miles, was in effect a proposal to extend the generally recognized limits of territorial jurisdiction and was based upon changed conditions in the power to defend.^a

The British Case ^b cites, from Hall on *International Law*, his references to more extensive claims to maritime jurisdiction by other nations. The present submission does not involve the examination of those exceptional cases "where continuous and established usage has sanctioned a greater width" of the territorial sea. The fact is well established that there are exceptions, based upon long continued assertion of jurisdiction acquiesced in by other powers, but such exceptions require no examination in this arbitration. There is no evidence before this Tribunal of any claim based on long continued assertion of jurisdiction over bays on the non-treaty coasts of the British Dominions in North America against the fishing vessels of the United States, with the acquiescence of the United States.

STATUTES.

In this connection the statutes cited in the British Case ^c will be examined.

Only three of the statutes referred to were enacted prior to 1818. The Act, 47 Geo. III, c. 12, s. 15, was enacted by the legislature of Lower Canada in 1807. This statute does not assume to assert jurisdiction over the Bay of Chaleurs. In any event, in 1807 the fishing vessels of the United States were at liberty to fish in the Bay of Chaleurs, under the terms of the treaty of 1783. The statute does not refer to foreigners and the presumption is that the act has no extra-territorial application to foreigners.

In *Regina vs. Keyn* (L. R., 2 Ex. Div., p. 210) Chief Justice Cockburn said:

For where the language of a Statute is general, and may include foreigners or not, the true canon of construction is to assume that the Legislature has not so enacted as to violate the rights of other nations.

The Act, 50 Geo. III, c. 5, was enacted by the legislature of New Brunswick in 1810, and was an act for the security of navigation and authorized the erection of beacons and buoys in Miramichi Bay.

^a *Annuaire de l'Institut de Droit International*, Tome XIII, 1894.

^b British Case, 114.

^c British Case, 112-114.

The Act, 39 Geo. III, c. 5, was enacted in 1799 by the legislature of the same province. The fishermen of the United States enjoyed, under the terms of the treaty of 1783, with British fishermen the common right of fishing in the waters of Miramichi Bay.

The act does not apply by its terms to foreigners, and, therefore, falls under the rule of interpretation cited in connection with the statute of 1807.

Even though it be admitted that the acts cited may be construed as assertions of jurisdiction, such unilateral actions of a nation in no way bind any other nation and establish no exclusive jurisdiction as against the nationals of other powers. The principle is well established in international law that unilateral assertions of jurisdiction (if such these statutes are claimed to be) even when they do not evoke any counter claim from other nations, can not be successfully asserted against nations which have not acquiesced by acts of unmistakable import. There was no acquiescence by the United States. Its fishermen during the entire period covered by these acts, passed prior to 1818, enjoyed the right in common with the fishermen of Great Britain in the waters referred to in these acts.

TREATIES.

The British Case refers ^a to the treaty between the United States and Great Britain in 1846.^b

This was primarily a treaty to remove "the state of doubt and uncertainty which has hitherto prevailed respecting the Sovereignty and Government of the Territory on the Northwest Coast of America lying westward of the Rocky or Stony Mountains."^c The line agreed upon was laid down along a channel dividing between the two countries the numerous islands adjacent to the coasts. The treaty specifically "provided, however, that the navigation of the whole of the said channel and straits south of the forty-ninth parallel of north latitude remains free and open to both Parties."^d

An extract from the treaty of 1848 between the United States and Mexico is relied upon by Great Britain.^e

This was also a stipulation in a boundary treaty and the position of the United States regarding the effect of such stipulations is

^a British Case, 110.

^b British Case, Appendix, 32.

^c British Case, Appendix, 32-33.

^d British Case, Appendix, 33.

^e British Case, Appendix, 34.

clearly shown by the note of August 19, 1848, from James Buchanan, then Secretary of State, to Mr. Crampton, the British minister at Washington :

In answer, I have to state, that the stipulation in the treaty can only affect the rights of Mexico and the United States. It is for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of complaint. The Government of the United States never intended by this stipulation to question the rights which Great Britain or any other Power may possess under the law of nations.^a

PUBLICISTS AND JURISTS.

The British Case cites Taylor's *International Public Law*, Wheaton's *Elements of International Law*, and Kent's *Commentaries* in support of its contention, that the usage of nations is inconsistent with the position of the United States in this arbitration. The United States maintains that the opinions of these publicists are not in opposition to its position.

The citation from Taylor is from page 278, but at page 296 of the same work he states :

While the people of all nations have an equal right to fish in the high seas and on the banks and shoal places in them, the state that owns the shore has the exclusive right of fishing within the three mile marine belt, following the sinuosities and indentations of the coast.

In the extract cited from Wheaton in the British Case,^b the author did not define what he intended by the words "enclosed by headlands." However, the authorities which Wheaton cited base the right of the state to jurisdiction over enclosed parts of the sea upon the power to defend possession from the shore at the entrances to such waters.

Wheaton cited Azuni, who, in his work on *The Maritime Law of Europe*, published in 1796, Part I, Cap. 2, Article III, Section 17 (American edition, 1806, pages 221-2) approved of the doctrine of Galiani and specified what is meant by "enclosed."

But not being able to surround nor strictly to defend the open sea, since no solid work can be erected on that element, it is impossible to guard it and consequently it is by nature incapable of being occupied. From opposite reasons he [referring to Galiani] concludes that when the shores of a sea belong to a single nation and enclose an expanse of water, large or small, which has no communication with the rest of

^a U. S. Counter Case, Appendix, 624.

^b British Case, 116-117.

the ocean, or communicates only by a narrow strait, this part of the sea may be lawfully possessed, since it may be occupied, enclosed and defended.

Azuni makes it clear at page 205, in section 15, of the same chapter what he intended by the power to defend:

It would be reasonable then, in my opinion, without inquiring whether the nation in possession of the territory has a castle or battery erected in the open sea, to determine definitively that the jurisdiction of the territorial sea shall extend no farther than three miles from the land, which is, without dispute, the greatest distance to which the force of gunpowder can carry a ball or bomb.

Wheaton cites Vattel's *Law of Nations*, which states, as already quoted, that the entrance to a territorial bay must be capable of defense.

Proceeding to the citation from Kent's *Commentaries*—Chancellor Kent was not stating the usage and practice of nations or his opinion of existing conditions when he wrote (vol. 1, 1st edition, p. 29):

Considering the great extent of the line of the American coasts, *we have a right to claim for fiscal and defensive regulations, a liberal extension of maritime jurisdiction*; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi.

He had just stated (1st edition, vol. 1, p. 29):

According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon shot will reach, and no farther, and this is usually calculated to be a marine league; and the Congress of the United States have recognized this limitation, by authorizing the District Courts to take cognizance of all captures made within a marine league of the American shores.

No such claim ever had been made, even "for fiscal and defensive purposes," and no such claim has since been made by the United States. Whatever Chancellor Kent's opinion may have been as to what *might* be claimed, the United States has never asserted exclusive jurisdiction over the waters included within the suggested limits.

Chancellor Kent quoted in the same section of his *Commentaries*, Mr. Madison's instruction to Messrs. Monroe and Pinkney, of May 17, 1806, to the effect that no *belligerent* right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another."

In the evidence before this Tribunal it is shown that this instruction of Mr. Madison's was a part of a diplomatic negotiation, undertaken for the purpose of keeping at a distance, from the shores of the United States, the battleships of Great Britain, then engaged in a war with France, and that the Secretary of State added in this instruction: "If the distance of four leagues cannot be obtained, any distance not less than one sea league may be substituted in the article. It will occur to you that the stipulation against the roving and hovering of armed ships on our coasts, so as to endanger or alarm trading vessels, would acquire importance as the space entitled to immunity shall be narrowed."

The evidence also establishes that Great Britain "contended that three marine miles was the greatest extent to which the pretensions could be carried by the law of nations and resisted, at the instance of the Admiralty and the law officers of the Crown, in Doctors Commons, the concession which was supposed to be made by this arrangement, with great earnestness."

The result of these negotiations was the unratified treaty of 1806, which provided:

It is agreed that in all cases where one of the said high contracting parties shall be engaged in war and the other shall be at peace, the belligerent power shall not stop, except for the purposes hereinafter mentioned, the vessels of the neutral power or the unarmed vessels of other nations within five marine miles from the *shore* belonging to the said neutral power on the American seas.*

Chancellor Kent evidently was not aware that Great Britain had refused to concur in such a proposal, and at the same time had asserted that the ordinary three mile limit was the greatest extent to which the pretension could then be carried.

JUDICIAL DECISIONS.

The Conception Bay case (Conception Bay is one of the bays on the non-treaty coast of Newfoundland), L. R. 2 A. C., p. 394, was decided on the ground that the Privy Council, as a British court, was bound by the Act 59 Geo. III, c. 38 (1819), enacted for the purpose of carrying out the terms of the treaty of 1818, and on the further ground that the Act was an assertion of dominion "and had not been questioned by any nation from 1819 down to 1872," and that this "would be very strong in the tribunals of any nation to shew

* U. S. Counter Case, Appendix, 22.

that this bay is by prescription part of the exclusive territory of Great Britain."

Professor Holland, of the University of Oxford, in his letters on *War and Neutrality*, page 133, commenting on this decision, states:

The subordinate question, also touched upon by the Admiral, of the character to be attributed to bays, the entrance to which exceeds six miles in breadth, presents more difficulty than that relating to strictly coastal waters. I will only say that the Privy Council, in *The Direct U. S. Cable Co. v. Anglo-American Telegraph Co.* (L. R. 2 App. Ca. 394) (the Conception Bay case), *carefully* avoided giving an opinion as to the international law applicable to such bays, but decided the case before them, which had arisen with reference to the Bay of Conception, in Newfoundland, on the narrow ground that, as a British court, they were bound by certain assertions of jurisdiction made in British acts of Parliament.

Sir Robert Finlay, in the course of his oral argument before the Alaskan Boundary Tribunal, said, with reference to this Conception Bay case, (Minutes of proceedings at London, vol. 6, Congressional reprint, 1904, p. 237):

It was not necessary in the case [Conception Bay Case] to decide the point on the question of international law because the point of controversy between the two companies was whether the waters of the bay could be considered as British territory as between them, and there was a statute which seemed to make an end of the point.

Lord Blackburn, in delivering the judgment in the Conception Bay case (page 419) stated:

It also shews that usage and the manner in which that portion of the sea had been treated as being part of the county was material, and this was clearly Lord Hale's opinion, as he says not that a bay is part of the county, but only that it may be. * * *

It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an *arbitrary* distance of ten miles. * * *

If it were necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from attempting to fulfill it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the

British territory, and part of the country made subject to the Legislature of Newfoundland.

To establish this proposition it is not necessary to go further back than to the 59 Geo. 3, c. 38, passed in 1819, now nearly sixty years ago. * * *

And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh convention was made, this would be very strong in the tribunals of any nation to shew that this bay is by prescription part of the exclusive territory of Great Britain. As already observed, in a British tribunal it is decisive.

Inasmuch as the Act of 59 Geo. III was passed immediately after the treaty of 1818, and merely used the words of the treaty, and since the evidence before this Tribunal establishes that the United States has steadfastly, since the question arose, not acquiesced in the exclusive dominion of Newfoundland or Great Britain over any bays on the non-treaty coasts, but has, on the contrary, asserted the right of American fishermen freely to resort to all such bays not less than six miles in width at their entrances so long as they did not fish within three marine miles of the shores thereof, it is apparent that the assumption by the Privy Council that the United States had "from 1819 down to 1872" not questioned the assertion of exclusive dominion over this bay is without foundation in fact. An examination of the record in this Conception Bay case also shows that it contains no evidence that the United States ever regarded this act as an assertion by Newfoundland or Great Britain of exclusive dominion over the waters of this bay.

The case of *Regina vs. Keyn*, (L. R. 2 Ex. Div., p. 63), was decided on the ground that the Central Criminal Court of England had no power to try, in the absence of statutory authorization, an offence committed by a foreigner on board a foreign ship within the limit of three miles from the English coast.

The case of *Regina vs. Cunningham* (Bell's Crown Cases, page 72) is not authority for the statement that "by the common law of England, all enclosed waters are within the realm."^a That case merely decided that an offence committed aboard a ship at anchor was committed within the jurisdiction of Glamorgan County in Wales "when [page 72] the ship was three-quarters of a mile from land," of the County of Glamorgan, and within "a quarter of a mile of the land which is left dry by the tide," and "when the offence was committed, the ship was inside and about two miles from the Flat Holms," an island, lying off the shore, and it having been determined

^a British Case, 112.

that (page 86) "the Holmes, between which and the shore of the County of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff and as part of the County of Glamorgan."

Delivering the opinion of the court, Chief Justice Cockburn said:

In this case we are of opinion that the conviction is right. *The only question* with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed forms part of the body of the county of Glamorgan; and we are of opinion that it does.

The British Case ^a refers to the capture of the British ship *Grange* by the French frigate *L'Embuscade* in Delaware Bay in 1793, and to the action of the United States in restoring the vessel to its owners, on the ground that it was captured in neutral waters.

In 1793 Great Britain and France were at war. The independence of the United States had been recognized only ten years before, and the new Republic was anxious to avoid complications with Great Britain. It is a matter of common knowledge that the French minister in the United States, Monsieur Genet, was attempting to make use of the territory of the United States as a base of hostile activities against Great Britain. In this state of affairs the United States declared, when the opportunity arose, that the waters of Delaware Bay, which are in reality but a part of the Delaware River, a broad navigable stream leading into the heart of one of the populous sections of the United States, and in fact to Philadelphia, then one of the most important ports of the United States and the capital of the nation, were neutral as against the hostile operations of the two powers then engaged in war.

This declaration has remained uncontested by any nation, and has never been made the basis of broad claims of jurisdiction over other bays adjacent to the shores of the United States.

The letter from Mr. Jefferson, then Secretary of State, to the minister of France, written in November, 1793, is referred to in the British Case. Mr. Jefferson stated:

Not proposing, however, at this time, and without a respectful and friendly communication with the Powers interested in this navi-

^a British Case, 84.

gation, to fix on the distance to which we may ultimately insist on the right of protection, the President gives instructions to the officers, acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league, or *three geographical miles from the sea shores.*^a

It is true, as stated in the British Case that Mr. Jefferson added—

For that of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States.^b

All “landlocked” rivers and bays are a part of the territory of the United States. The several States had enacted no legislation intending to enlarge the customary extent of maritime jurisdiction over bays.

In 1862 during the Civil War in the United States, an organized force of the States in rebellion, proceeded overland, embarked on the waters of the Chesapeake Bay, a body of water leading by a navigable river to Washington, the national capital, and into a populous interior district, as in the case of the Delaware Bay and River, and captured and destroyed the *Alleganean*, a vessel duly registered in and sailing from a loyal port in the United States. When later, commissioners appointed to apportion the award of the Geneva Tribunal, considered the claim of the owners of the *Alleganean*, they decided that the waters of Chesapeake Bay could not be used for the operations of war to the injury of the United States. The waters of this bay are open to the vessels of all nations for all peaceful purposes.

The Supreme Court of the United States, in *Manchester vs. Massachusetts*, 139 U. S. Reports, p. 258, held:

We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purposes of self-protection *in time of war* or for the prevention of frauds on its revenue, exercise an authority beyond this limit.

^a British Case, Appendix, 56.

^b British Case, 84.

QUESTION SIX.

Have the inhabitants of the United States the liberty under the said article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

THE CONTENTIONS OF GREAT BRITAIN AND THE UNITED STATES.

The contention presented by Great Britain is that the liberty "to fish on the southern, western and northern coasts of Newfoundland and on the shores of the Magdalen Islands, does not include the liberty to fish in the bays, harbours and creeks on such coasts or shores."^a Stated conversely, the contention is that the only fishing liberty, which the United States secured by the treaty 1818 on those coasts, was the right to fish in a belt of water three miles wide. Outside was the open sea where any man could fish, and on the inside were bays, harbors, and creeks, from which, by this construction, the American fisherman were to be excluded. Precisely where this belt lies is not made clear, but presumably it will be claimed that it lies outside a line drawn across the entrances of all bodies of water which were in 1818 called bays.

The United States denies that any such construction is possible, and insists, as fully stated in the discussion of Question Five, that in no event can the exclusion, sought to be enforced by Great Britain, extend to bodies of water exceeding six miles in width at their entrances. The present discussion, however, will deal with the British contention as broadly as it is presented.

The effect of this contention would be to deprive American fishermen of substantially all valuable rights on the Newfoundland shores, except those of curing and drying on the southern side from Cape Ray to the Rameau Islands. Herring and bait fishes are to be taken almost wholly, if not exclusively, in the bays and harbors.

It is confidently believed that the Tribunal will not, except upon the clearest proof, adopt a contention which would deprive the United

^a British Case, 126.

States of all real benefit under the treaty and would leave American fishermen a trivial and barren right.

The British contention was originated by Sir Robert Bond, premier of Newfoundland, in a debate in the House of Assembly of that colony, April 7, 1905, eighty-seven years subsequent to the ratification of the treaty of 1818. He said on that occasion :

I believe I am correct in saying that it is the first time that this position has been taken, and, if I am correct in my interpretation of the treaty of 1818, the whole winter herring fishery of the west coast has been carried on for years by the Americans simply at the sufferance of the government of this Colony.^a

His construction of the treaty failed to produce conviction in the minds of the members of his own Government, or of the Government of Great Britain. No mention of it was ever made in the voluminous correspondence between Great Britain and the United States until Question Six was proposed by Great Britain, that Government having agreed with Sir Robert Bond to include it in this arbitration, as a means of securing the assent of Newfoundland to the *modus vivendi* of 1907.

The Case of the United States states that :

Great Britain has never, by word or act, throughout the entire history of this controversy questioned the right of the inhabitants of the United States under the treaty of 1818 to take fish in the bays and harbors of the southern and western coasts of Newfoundland which form part of the so-called "treaty coasts;"

that—

such question has never been raised or even mentioned in any of the discussions between the two governments with respect to the interpretation of this treaty;

and that—

the United States has always asserted the right of the American fishermen to take fish in the waters referred to, and American fishermen have, ever since the treaty was made, openly exercised their right to take fish in these waters without objection or interference by the Newfoundland government up to the present time.^b

The British Counter Case, in the fraction of a page which it devotes to this Question, makes no denial of either of the first two of the above assertions, and contents itself with saying that the third assertion "cannot be admitted."^c It will be observed that Great Britain fails to produce the slightest evidence to sustain this qualified denial.

^a U. S. Case, 245.

^b U. S. Case, 244-245.

^c British Counter Case, 59.

In the view of the United States, the custom and usage of the ninety years following the treaty, which are fully proved in its Case and Counter Case, and the unquestioned interpretation of the treaty during that period both by the parties to it and also by Newfoundland, preclude the possibility of the adoption of Sir Robert Bond's theory of construction; and, moreover, the necessary results flowing from an adoption of the theory conclusively negative its validity. It will, however, be convenient, before presenting these considerations in detail, to take up the British contention in the form in which it is stated.

A full examination of the British Case and Counter Case discloses that Great Britain in support of its contention entirely disregards the negotiations which resulted in the treaty of 1818 and everything which has transpired since that time. Apart from an unsupported assumption concerning the intention of the negotiators of the treaty, and a suggestion that there may have been a motive resulting from the claim of the French to an exclusive right on the western coast of Newfoundland, the British contention rests entirely on a verbal nicety.

It is based on the use of the word "coasts" followed by the words "bays, harbours, and creeks" in defining the liberty to fish on the Labrador coast, and on the use of the word "coast" alone when speaking of the liberty on the Island of Newfoundland, and the use of the word "shores" alone when speaking of the liberty on the Magdalen Islands. Stated in greater detail, the British contention is this: The word "coast" is used alone in one place and is followed by the words "bays, harbours and creeks" in other places in the treaty, and, therefore, "coast" must mean "something distinct from bays, harbours and creeks."^a This distinction must be, if the argument is to have any force, that "coast" means so much of the "coast", as is left after the "bays, harbours and creeks" have been subtracted. Applying this "more restricted" meaning to the word "coast" where it appears in defining the liberty on the Island of Newfoundland, i. e. "the southern coast" and "the western and northern coast of Newfoundland," and understanding the word "coast" to have the same meaning in all parts of the treaty, the result is reached that only portions of the coast of Newfoundland are secured to Americans. By some process of reasoning, which is not

^a British Case, 124.

clear, the same result is reached concerning "the shores of the Magdalen Islands." Nothing appears in the treaty to change the well known meaning of the word "shores," but for consistency's sake it is said:

The above argument with regard to the "coast" of Newfoundland, therefore, applies to the "shores" of the Magdalen Islands.^a

Reserving the discussion of the method of construction contended for by Great Britain until a later paragraph in this argument, attention is called to the source from which the words of the treaty are taken, to the various treaties cited in the British Case, and to the intention of the negotiators of the treaty of 1818.

TREATY OF 1783.

The British Case contends that the language used in the treaty of 1818 "makes a clear distinction between 'coasts' on the one hand and 'bays, harbours and creeks' on the other, as the treaty of 1873 had already done, and as the treaties of 1854 and 1871 subsequently did."^b

It is proposed to show that the language of the treaty of 1818 was drawn from the treaty of 1783 and has the same meaning in both treaties, and that no such distinction was intended to be made.

On the contrary the treaty of 1783 between the United States and Great Britain furnishes, it is believed, controlling evidence that "coasts" is not to be deprived of its usual meaning, but clearly is synonymous with the word "shores." That treaty provides as follows:

And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the *coast* of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America.^c

It is only on the shores of the bays and harbors that fish can be dried and cured, and not on the open and exposed portions of the coast. Why, then, was it necessary to provide against drying and curing, if "coast" meant only such exterior and unavailable portions of the coast? If "coast" included bays, harbors, and creeks, then the prohibition against drying and curing is intelligible, but not otherwise.

^a British Case, 126. ^b British Case, 124. ^c U. S. Case, Appendix, 24.

It is unmistakable that American fishermen had the right under the treaty of 1783 to fish in the bays of Newfoundland, for it was "on such part of the coast of Newfoundland as British fishermen shall use" that the liberty was secured to them. This language is followed immediately in the treaty by the words, "and also on the coasts, bays and creeks of all other of His Britannic Majesty's Dominions, etc." Will it be contended that here, too, the use of the words, "bays and creeks," as to other coasts, has the effect of limiting the extent of the coast of Newfoundland which American fishermen could use, and makes it less than "such part of the coast of Newfoundland as British fishermen shall use?" If not in this treaty, and it certainly cannot be so contended, why in that of 1818?

The explanation of the use of the word "coast" in the treaty of 1818 is that, as to Newfoundland, it was adopted from the treaty of 1783, and means just what it meant in that treaty and just what it meant in the French treaties of 1763, 1783, and 1814, which are discussed later in this argument.

There was no doubt of the right of Americans to use the bays under the treaty of 1783. The right was distinctly recognized in a report, dated April 24, 1793, of a committee of the House of Commons appointed to inquire into the state of the trade to Newfoundland, in the following language:

By that treaty (1783) the North American colonies, now become independent States, are permitted to fish not only upon the banks of Newfoundland, but in all the *bays, creeks, and rivers* of that island, as of Nova Scotia and Cape Breton, as well as upon their own banks of St. George.^a

As to the Magdalen Islands, the phrase in the treaty of 1818 changes to "on the shores." Why? Possibly only for the sake of variety and to avoid the use six times in the same sentence of the word "coasts;" probably, however, because coast is more commonly used with reference to the sea boundary of the mainland or of great islands taking the character of mainland, and is an inappropriate word for the strand of little islands.

The same use of the words is to be noticed in the treaty of 1854—with permission to land upon the coasts and shores of those colonies, and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish.^b

^a U. S. Counter Case, Appendix, 560, 562.

^b U. S. Case, 134; Appendix, 26.

The evident reading distributively is, coasts of those colonies and shores of the islands thereof, and also upon the Magdalen Islands.

When the treaty of 1818 deals with Labrador the phrase changes again and, reducing the extent of coast secured to the United States, follows almost exactly the closing language of the corresponding part of the treaty of 1783.

1783—

and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America.

1818—

and also on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador to, and through the Straights of Belle-isle and thence northwardly indefinitely along the *coast*, without prejudice, etc.

It will be noticed how completely "coast" sweeps in and includes the detail of bays, harbors, and creeks previously mentioned.

If any further evidence were needed that the negotiators were following literally the treaty of 1783, the almost identical language used concerning the right to dry and cure fish would furnish it. Even the peculiar phrase "without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground," is copied almost verbatim.

It is submitted, then, that the treaty of 1818 was in many respects a Chinese copy of the treaty of 1783. The extent of fishing grounds was reduced, but on the portions of the coasts where the right to fish was retained, it covered the same waters to which it previously extended. Americans used the bays, harbors, and creeks of all British coasts in the North Atlantic before 1818; they used them afterwards upon a more limited extent of coast.

CONTENTION OF THE UNITED STATES CONFIRMED BY GREAT BRITAIN.

Lord Bathurst, in his instructions to the governor of Newfoundland of June 21, 1819,^a immediately after the signing of the treaty and the passage of the act of 1819, which he enclosed, made no suggestion that Americans are to be excluded from the bays of

^a British Case Appendix, 99.

Newfoundland, but clearly recognized that they were to have the same rights there as under the treaty of 1783. Defining American rights under the treaty of 1818, he used the words "upon the coast of Labrador" as synonymous with the words "coasts, bays, harbours and creeks" of Labrador used in the treaty. He pointed out a distinction between the use of "the southern part of the *coast* of Newfoundland" which he said "stands in some degree upon a different footing" and is "a new privilege conferred for the first time by this convention" (of 1818) and said it "is more limited than that assigned to them [Americans] on the *coast* of Labrador."

But the distinction made by him is not this highly attenuated definition of the word "*coast*." The difference pointed out is that Americans had the right to cure fish under the treaty of 1783 in the bays and harbors of Labrador *then* unsettled.

Sir Robert Bond, in his speech of April 7, 1905, in which this claim of exclusion from the bays of the treaty coast was advanced for the first time, made the same statement concerning the continuance of former rights:

The House will not fail to observe that the ancient right of fishing enjoyed by the fishermen of the United States, in common with the subjects of Great Britain, was continued in force by the treaty of 1818, in the first place along a certain portion of the coast of Newfoundland, viz: On the southern coast extending from Cape Ray to Rameau Islands, and on the western and northern coast from Cape Ray to Quirpon Islands; and, in the second place, along the coasts, bays, harbors and creeks of the Labrador coast, from Mount Joly on the southern coast of Labrador to and through the Straits of Belle Isle, and thence northwardly indefinitely.^a

Previous to the War of 1812 Americans had the unquestioned right to take fish of every kind in the bays, harbors, and creeks of the coast of Newfoundland, as of all other of His Majesty's dominions in North America. Lord Bathurst clearly understood that this right was preserved to them by the treaty of 1818 on certain specified portions of that coast. For that reason he drew no distinction between the coasts of Labrador and the coast of Newfoundland. Sir Robert Bond, however, nearly ninety years later discovered a distinction, of which Lord Bathurst, who directed the British negotiation, was not aware.

^a U. S. Counter Case, Appendix, 414, 420.

INTENTION OF THE NEGOTIATORS OF THE TREATY OF 1818.

The Counter Case of the United States discusses the intention of the parties to the treaty in the light of the negotiations which led up to it, and points out the failure of the British Case to produce any evidence in support of the British assumption on that subject.^a

The claim, that the negotiators intended to effect an exclusion of American fishermen from the bays of Newfoundland, is, moreover, negatived by the fact that the southern coast of Newfoundland is included in the claim of exclusion so far as fishing is concerned, and that the negotiators clearly intended that there should be the same rights on the southern coast of Newfoundland as on Labrador where the right in the bays is unquestioned. This is shown by the proposal of the British negotiators of October 6, 1818. They had before them the American proposal of September 17, 1818, which used the word "coast" in speaking of Newfoundland and the words "coasts, bays, harbours, and creeks" in speaking of Labrador, i. e., the words which appear in the treaty as finally adopted and about which the present contention arises.^b

The British proposal of October 6, instead of following this language, uses the word "coast" or "coasts" of the liberties proposed to be granted on *both* Labrador and Newfoundland, the words "bays, harbours, and creeks" not appearing until the liberty "to dry and cure fish" is mentioned. That "coasts" included bays, etc., as they understood it, is shown in the next paragraph of the proposal, where it is provided that nothing contained in the article shall be construed to give the "liberty to take fish within the rivers of His Britannic Majesty's territories, as above described." No suggestion was ever made by them that they understood the word "coasts" to mean anything less than the whole coast, inclusive of bays, harbors, and creeks.

An examination of the course of the preliminary negotiations in 1816 leads to the same result. The proposition from the British Government contained in a note dated November 27, 1816, from Mr. Bagot to Mr. Monroe,^c after referring to a former proposal with reference to the coast of Labrador proposed in addition that "they should be admitted to that portion of the southern coast of Newfoundland

^a U. S. Counter Case, 77, et seq.

^b U. S. Case, Appendix, 310.

^c U. S. Case, Appendix, 289-291.

which extends from Cape Ray eastward to the Rameau Islands," and added:

The advantages of this portion of the *coast* are accurately known to the British Government; and in consenting to assign it to the uses of the American fishermen, it was certainly conceived that an accommodation was afforded as ample as it was possible to concede, without abandoning that control within the entire of His Majesty's own *harbors and coasts* which the essential interests of His Majesty's dominions required.^a

It is true that what Mr. Bagot had principally in mind was the convenience to American fishermen of a more southern coast on which to dry and cure fish. But it is equally true that he intended to give the same privileges on this section of coast as he had offered to give on the Labrador coast. The bays and harbors of the Labrador coast were assigned for the purposes both of fishing and curing fish, and there is no intimation that Mr. Bagot offered to assign the southern coast of Newfoundland for any different or more restricted purposes. He makes no reservations. Nowhere is there the preposterous suggestion that Americans should have the right to dry and cure fish on the shores of bays but that they should not have the right to fish in the waters of such bays.

The language of the treaty as finally agreed to was almost verbatim that of the first draft prepared by Messrs. Gallatin and Rush and submitted by them to the British representatives. That they intended by it to be accorded more rather than less than had previously been offered by Mr. Bagot, and that they were so understood by the British negotiators, appears from the latter's report of their conference to Viscount Castlereagh:

They [Messrs. Gallatin and Rush] added that while they could not but regard the propositions made to the Government of the United States by Mr. Bagot as altogether inadmissible, inasmuch as they restricted the American fishing to a line of coast so limited, as to exclude them from their fair participation, they had nevertheless been anxious in securing to themselves an adequate extent of coast, to guard against the inconveniences which they understood to constitute the leading objection to the *unlimited exercise of their fishing*. *With this view they had contented themselves with requiring a further extent of coast, in those very quarters* which Great Britain had pointed out, because it appeared to them that the very small population established in that quarter and the unfitness of the soil for cultivation rendered it improbable that any conduct of the American fishermen in that quarter could either give rise to disputes with the inhabitants, or to injuries to the revenue.^b

^a U. S. Case, Appendix, 291.

^b British Case, Appendix, 86.

THE FRENCH TREATIES.

It is not proposed to review the French claim of an exclusive right. Reference is made instead to the Counter Case of the United States on that subject.^a A reason, the existence of which Great Britain always strenuously denied against the French, can with little grace be set up as valid against the United States. The language of the French treaties serves to illustrate the meaning of "coasts" and attention is asked to them in that regard. It will be noted that none of the words "coasts," "bays," "harbours" or "creeks" appears in the French treaties of 1713 and 1748. The word *coast*, and *coast* alone, appears first in the French treaty of 1763.

The Treaty of Utrecht reserved to French subjects the right—to catch fish and to dry them on land in that part only, and in no other besides that, of the said Island of Newfoundland which stretches from the place called Cape Bonavista to the northern point of the said island and from thence running down on the western side [la partie occidentale] reaches as far as the place called Point Riche.^b

The treaty of 1748 renewed and adopted the language of the treaty of 1713 without change. Referring to this liberty the treaty of 1763 provided that:

The subjects of France shall have the liberty of fishing and drying on a part of the *coasts* of the Island of Newfoundland such as is specified in Article XIII of the Treaty of Utrecht, which article is renewed and confirmed by the present treaty, (except what relates to the Island of Cape Breton as well as to the other islands and *coasts* in the mouth and in the Gulph of St. Lawrence).^c

The liberty of drying and curing fish on the "coasts" was secured and therefore "coasts" included the bays and harbors and creeks, for in them only can drying and curing take place, and no question was ever raised as to that interpretation.

The treaty of 1783 changed the "French coast" so that it, "beginning at the Cape St. John, passing to the north and descending by the western *coast* of the Island of Newfoundland, shall extend to the place called Cape Raye."^d

Again the only word used is "coast." And His Majesty in his declaration of September 3, 1783, uses no other word than "coasts" in promising to prohibit "his subjects from interrupting in any

^a U. S. Counter Case, 81, et seq.

^b U. S. Case, Appendix, 51.

^c U. S. Case, Appendix, 52.

^d U. S. Case, Appendix, 54.

manner by their competition the fishery of the French during the temporary exercise of it, which is granted to them, upon the *coasts* of the Island of Newfoundland.”^a

It is well known that the French have had free access under these treaties for two centuries to all the bays, harbors, and creeks on the coast assigned them. Their right included the right to dry fish, but it was not at any time deemed necessary to refer to bays and harbors, though it was only in them that landings could be had for purposes of drying.

The word “coast” was used to define the French right and the same word was used to define the American right. If it included, as it did, “bays, harbours and creeks” for the French, it included them for the Americans.

It is to be further noted in considering this Question that the treaty of 1818 is explicit in excepting the rights of the Hudson Bay Company; and in providing against the free use of the southern coast of Newfoundland and the entire coast of Labrador when they become settled, for the curing and drying of fish; and in guarding on the non-treaty coasts against the abuse of the privilege of entry for shelter and repairs and of procuring wood and water. In a treaty containing such provisions as these so vital a matter as the treaty rights of a great and powerful nation like the French, if anyone supposed them to be paramount or exclusive, would not have been left to inference.

A further weakness in the argument presented in the British Case on this point is evident, when it is remembered that the French coast did not include the southern coast of Newfoundland, nor any part of the Magdalen Islands, while the British Case, however unwillingly, is compelled to include both in its contention.^b

TREATIES OF 1854 AND 1871.

The British Case contends that—

The treaties under discussion are by no means singular in their use of the word “coasts.” In the treaty of 1854 (known as the reciprocity treaty) between Great Britain and the United States, for example, the word means, as in the 1818 treaty, something different

^a U. S. Case, Appendix, 55.

^b U. S. Counter Case, 88.

from the indentations of the shore. By that treaty liberty was given to United States fishermen to take fish—

“On the sea-coasts and shores, and in the bays, harbours and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island and of the several islands thereunto adjacent.”^a

This extract from the treaty, quoted in the British Case, has to be taken away from its context and set apart by itself to lend color to the British contention.

When examined as a whole it is self evident that “coast” in the treaty of 1854 is used in the sense ascribed to it in this argument, i. e., as inclusive of bays, harbors and creeks.

In the first place the preamble to the treaty recites:

The Government of the United States being equally desirous with Her Majesty the Queen of Great Britain to avoid further misunderstanding between their respective citizens and subjects in regard to the extent of the right of fishing on the *coasts* of British North America, secured to each by Article I of a convention between the United States and Great Britain, signed at London on the 20th day of October, 1818.^b

Article I provides:

It is agreed by the high contracting parties that in addition to the liberty secured to the United States fishermen by the above mentioned convention of October 20, 1818, of taking, curing and drying fish on certain *coasts* of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell fish, on the sea coasts and shores, etc.

It must be conceded that “coast,” as used in the extracts quoted above, includes bays, harbours, and creeks. Thus in Article I, the reference to the rights of the United States of curing and drying fish acquired under the treaty of 1818 is in the words “*curing and drying fish on certain coasts*,” although in the treaty of 1818 the language is “to dry and cure fish in any of the unsettled bays, harbours and creeks.”

The preamble quoted above, stating the misunderstanding which it was desired to avoid, uses the word “coasts” alone, although the seizures that had given rise to the negotiation had been made in bays, harbors, or creeks. Clearly the word “coast” as used here embraced bays, creeks, and harbors.

With reference to the duties of the commissioners, who were to be appointed under that treaty, Article I reads:

Such commissioners shall proceed to examine the *coasts* of the North American provinces and of the United States, embraced within

^a British Case, 125.

^b U. S. Case, Appendix, 25.

the provisions of the first and second articles of this treaty, and shall designate the places reserved by the said articles from the common right of fishing therein.^a

The places reserved were "rivers and the mouths of rivers."^b It is a matter of common knowledge that most rivers empty into bays rather than directly into the ocean; an examination of the maps submitted will disclose that fact. It follows that here too the word coast must include bays.

Very nearly the same language is employed in the fishery articles of the treaty of 1871^c as in that of 1854, and the above discussion has equal application to it. It should also be noted that in this treaty the word "coast" was used repeatedly as meaning the shore.

USE OF "COAST" IN OTHER TREATIES, ACTS, MEMORIALS, ADDRESSES, HISTORIES, ORDERS, AND REGULATIONS.

It is instructive to note the use of the word "coast" in other treaties and formal documents, in addition to those referred to in the British Case. Its use in some of the French treaties has already appeared.

1809: Act of March 30 (49 George III, Cap. 27):

An act for establishing courts of judicature in the island of Newfoundland and the islands adjacent and for re-annexing part of the *coast* of Labrador and the islands lying on the said *coast* to the government of Newfoundland.

XIV. And whereas His Majesty by his proclamation of the 7th day of October 1763 was pleased to declare that he had put the *coast* of Labrador from the River St. John, etc. under the care and inspection of the governor of Newfoundland. * * *

And whereas * * * the Province of Quebec was divided into two provinces of Upper and Lower Canada the latter including the parts of the *coast* of Labrador and the said islands so formerly annexed * * *.

And whereas it is expedient that the said *coast* of Labrador * * * should be re-annexed, etc.

Be it therefore enacted that such parts of the *coast* of Labrador from the River St. John to Hudson's Strait * * * be again re-annexed to the government of Newfoundland.^d

^a U. S. Case, Appendix, 27.

^b U. S. Case, Appendix, 26.

^c U. S. Case, Appendix, 29-30.

^d U. S. Counter Case, Appendix, 67.

1814: Treaty of May 30, 1814, between Great Britain and France:

XIII. The French right of fishery upon the Great Bank of Newfoundland, upon the *coasts* of the island of that name and of the adjacent islands, etc.^a

1825: Act of June 22, 1825 (6 George IV. Cap. 59), re-annexing to lower Canada a part of Labrador, viz:

so much of the said *coast* as lies westward of a line to be drawn due north and south from the Bay or Harbour of Ance Sablon.^b

1832: British North America, M'Gregor:

Cabot, by the most undoubted authority, discovered and *landed* on the *coast* several years before and took possession of this island, which he named Baccalaos. * * *

The *coast* of Labrador was in 1763 separated from Canada and annexed to the government of Newfoundland.^c

1857: Treaty of January 14, 1857, between Great Britain and France:

Relative to the fisheries on the *coast* of the island of Newfoundland and the neighboring *coasts* by regulating with exactness.

ART. I. French subjects shall have the exclusive right to fish and to use the strand for fishery purposes * * * on the east *coast* of Newfoundland * * * on the north *coast* of Newfoundland * * * and on the west *coast* in and upon the five fishing harbors of * * *

ART. III. French subjects shall have the right concurrently with British subjects to fish on the *coasts* of Labrador.^d

1867: Treaty of November 11, 1867, between Great Britain and France:

British fishermen shall enjoy the exclusive right of fishing within the distance of three miles of low-water mark along the whole extent of the *coasts* of the British Islands.^e

1870: The British foreign office memorandum of 1870 referring to the treaty of 1818:

When such a bay, etc., is not a bay of Her Majesty's dominion the American fishermen will be entitled to fish in it, except within three miles of the *coast*.^f

1877: British case before Halifax Commission:

American fishermen pursue their calling around the islands and in the harbours of the Bay of Fundy and along *parts of the coasts* of Nova Scotia and New Brunswick *bordering the said bay*.^g

^a U. S. Case, Appendix, 57.

^b U. S. Counter Case, Appendix, 71.

^c U. S. Counter Case, Appendix, 566.

^d U. S. Case, Appendix, 58-60.

^e British Case, Appendix, 38.

^f U. S. Case, Appendix, 629.

^g U. S. Counter Case, Appendix, 534.

1885: Arrangement, 14th November, between Great Britain and France, 1885.

West Side—Côte Ouest (from Cape Ray to Cape Norman):

3. That *portion of the coast* situated between Cape Cormoran and the west point of Pic Denis Harbour *in the Bay of Port à Port* on the west.

10. That portion of the *coast* following the *sinuosities* of the following bays—Fourché, Orange, Great and Little Calves.

12. That portion of the *coast* situated on the east side of the *Bay of Pines* and stretching from the 50th degree of latitude to the north point of that part of the *bay*.

14. That portion of the *coast* following the *sinuosities* of Paquet Harbour.^a

1886: Report of the Canadian privy council, June 14, 1886:

1. In the first place the undersigned would ask it to be remembered that the extent of the jurisdiction of the Parliament of Canada is not limited (nor was that of the Provinces before the union) to the sea-coast, but extends for three marine miles from the *shore* as to all matters over which any legislative authority can in any country be exercised within that space. The legislation which has been adopted on this subject by the Parliament of Canada (and previously to confederation by the Provinces) *does not reach beyond that limit*. It may be assumed that, in the absence of any treaty stipulation to the contrary, this right is so well recognized and established by both British and American law, that the grounds on which it is supported need not be stated here at large. The undersigned will merely add, therefore, to this statement of the position, that so far from the right being limited by the convention of 1818 *that convention expressly recognizes it*.^b

1866: Canadian fishing regulations:

By this you will observe, United States fishermen are secured the liberty of taking fish on the southern *coasts* of Labrador, and around the Magdalen Islands and of drying and curing fish along certain of the southern *shores* of Labrador, where this *coast* is unsettled, or if settled, after previous agreement with the settlers or owners of the ground.^c

1888: Unratified treaty between the United States and Great Britain:

Long Island and Bryer Island at St. Mary's Bay in Nova Scotia shall for the purpose of delimitation be taken *as the coasts of such bay*.^d

1892: The Newfoundland Consolidated Statutes, 1892; ch. 124, sec. 16:

No person shall, upon the *coasts* of this colony or its dependencies, use, for the purpose of taking codfish, any trap, the walls or sides

^a U. S. Case, Appendix, 77-80.

^c U. S. Case, Appendix, 758.

^b U. S. Case, Appendix, 812.

^d U. S. Case, 204; Appendix, 41.

of which consisted at its original construction of meshes less than four inches, and no netting for alterations or repairs of cod-traps shall be less than four inches.^a

1907: Letter of Lord Elgin to Governor McGregor, September 11:

With regard to the taking, drying and curing of fish by the inhabitants of the United States of America in common with British subjects on the *coasts* of Newfoundland.^b

1908: Newfoundland fishing regulations: section 82:

The governor in council may grant to any person a license to erect houses on any part of the *coast* of this colony for the cold storage of bait fishes, and no person shall erect houses for the cold storage of bait fishes on any part of the *coast* of the colony without having first obtained a license.^c

It is unmistakable that the word "coast" was commonly and constantly used to describe the edge or shore of the sea, whether the line was straight, as it rarely is, or curved and indented by bays and inlets. It is used of the places where fish may be dried and cured (that is of shores of bays and harbors); of stretches of shore which are elsewhere detailed as "coasts, bays, harbours and creeks;" as meaning the strand, low water mark, the sinuosities of bays, the shore, the shore line of a bay, etc.

^a U. S. Case, Appendix, 177.

^c U. S. Case, Appendix, 210.

^b U. S. Case, Appendix, 1019.

NOTE.—See use of the word "coast" by Earl of Kimberley, 1870 (U. S. Case Appendix, 629); French treaties (U. S. Case App., 55, 56, 57, 58, 59, 60, 61, 69, 70, 71, 72, 73, 76, 82, 83, 85); Newfoundland Statutes (*ibid.*, 177, 188, 193, 196); Newfoundland Fishery Regulations (*ibid.*, 209, 210, 211); Negotiations of Treaty of 1783 (*ibid.*, 219); Negotiations of Treaty of Ghent (*ibid.*, 251, 254); Earl of Derby, 1884 (U. S. Counter Case Appendix, 306-309); "The Western Star," Newfoundland (*ibid.*, 386); speech of Mr. Morine, Newfoundland Assembly, 1905 (*ibid.*, 452); Monroe to Adams, 1816 (U. S. Case Appendix, 289); protocol of 1888 (*ibid.*, 44); Nova Scotia Revised Statutes, 1851, chapter 94, page 320 (*ibid.*, 125).

Sir Anthony Perrier memorandum to the Earl of Malmesbury concerning the negotiations with the French in 1852. (U. S. Counter Case Appendix, 228.)

Newfoundland Act of March 27, 1862, section 1. (U. S. Case Appendix, 161.)

Newfoundland Cons. Stats. (1872), sections 2, 3. (*Ibid.*, 163.)

Newfoundland Act of March 19, 1879, section 1. (*Ibid.*, 166.)

Newfoundland Cons. Stats. 1879, sections 1, 2, 3. (*Ibid.*, 168.)

Newfoundland Cons. Stats. 1892, section 1. (*Ibid.*, 175.)

The dictionaries of the period define *coast* and *shore* as meaning the same thing.^a

Statutory definitions are declaratory of the recognized standard definitions.

The Scotch Herring Fisheries Act, 1867 (30 and 31 Vic., ch. 52, § 11):

The *coasts* of Scotland shall mean and include all *bays, estuaries, arms of the sea* and all tidal waters within the distance of three miles from the mainland or adjacent islands.

Irish Fisheries Act, 1846 (10 and 11 Vic., ch. 3, § 87):
and the words "sea or sea coast" shall extend to all places where the tide ebbs and flows.

SHORES OF THE MAGDALEN ISLANDS.

The discussion has thus far been confined to the use of the word "coasts" in the treaty of 1818, though attention has been called to the transition from "coasts" in speaking of Newfoundland to "shores" in speaking of the liberty secured on the Magdalen Islands. So far as appears, either in correspondence or in legislation, no suggestion of an intention to exclude American fishermen from the use of the bays and harbors of these islands has ever been made. But the word "shores" appears alone in the treaty, without "bays, harbours, and creeks," as the word "coast" appears alone in the grant of the fishing liberty in Newfoundland waters, and for consistency's sake the Magdalens are, perforce, included in the Newfoundland contention.

^a *Ash* (London, 1795):

The edge of the land next the sea, the shore; the bank of any large river or water, the side of anything; the part of the country within view.

Barclay (London, 1744):

A shore or land, which lies near and is washed by the sea.

Walker (American, 1813; London, 1818); *Johnson* (London, 1805):

The edge or margin of the land next the sea, the shore.

Johnson (Philadelphia, 1818; London, 1818):

The edge or margin of the land next the sea, the shore. It is not used for the banks of less waters.

Webster (Hartford, 1806):

An edge of the land, side, shore, border.

J. K. (London, 1848):

The sea-shore, a country lying on the sea.

Smyth (London, 1867):

The sea-shore and the adjoining country, in fact, the sea front of the land. (See Shore.)

Bailey (London, 1736):

A country lying on the sea shore; also the seashore. •

Bailey (London, 1764):

The edge of the land next the sea, the sea-shore; it is not used for the banks of less waters. 2. It seems to be used by Newton for side.

Bailey (London, 1783):

A country lying on the sea; a sea shore.

As already pointed out, it is stated in the British Case:

The word "shores" in Article I of the treaty is used to express the same idea as "coasts" in other parts of the article.^a

The United States is in full accord with this position. Shores and coasts mean the same thing in the treaty. Messrs. Gallatin and Rush correctly used them interchangeably. But, when Great Britain concedes that these words have the same meaning, it is difficult to see what remains of the British contention as to this Question. There is no word in the language of clearer meaning than the word "shores" which invariably means the land bordering upon the water.^b

The only question which has ever been raised as to the meaning of the word "shore," as used in the treaty of 1818, arose as to the right

^a British Case, 126.

^b In law it means:

The space between ordinary high-water mark and low-water mark; beach; flats.

See *Blundell v. Catterall*, 5 B. & A., 268 (1821); *Mellor v. Walmesley* (1905), 2 ch., 164.

In Roman law the shore included the land as high up as the largest wave extended in winter. (*Burrill*, Law Dictionary.)

Early dictionary definitions are to the same effect.

Bailey, *Nathaniel* (1736 and 1764):

The side or bank of the sea, river, etc.

Bailey, *Nathaniel* (1783):

The side or bank of the sea, river, a coast or tract of land on the sea side.

Ash (1795):

The coast of the sea, the bank of a river.

Barclay (1799):

The coast or land which borders on the sea.

Walker (American, 1813):

The coast of the sea, the bank of a river.

Johnson (London, 1805):

The coast of the sea.

Johnson (American, 1818): and

Walker (London, 1818; American, 1818):

The coast of the sea, the bank of a river.

J. K. (London, 1748):

A tract of land on the seaside.

Ogilvie (London, 1866):

The place where the continuity of the land is interrupted or separated by the sea or the river; the coast or land adjacent to the ocean or sea, or to a large lake or river.

Bouvier, Law Dictionary (American, 1897):

Land on the side of the sea, a lake or a river. Strictly speaking, when the water does not ebb and flow in a river, there is no shore.

Hall, (Rights of Crown in the Sea Shore (1830), reprinted in Moore History of the Foreshore, London, 1888):

In the Roman law the shore extended *quatenus hybernus fluctus maximus eacurrit*, a boundary line equivalent, as it would seem, to the limits of our high spring tides. But with us it has long been settled that that portion only of the land adjacent to the sea, which is alternately covered and left dry by the ordinary flux and reflux of the tide is, in legal intendment the sea-shore (p. 674).

Below this ordinary high water mark, down to the low water mark, i. e. between the ordinary high and low water marks, lies the shore, or littus maris. This shore, throughout the coasts of England, as well of the sea, as of creeks and tide rivers, doth (prima facie) *de jure communi* (and in common prescription) belong to the King (p. 678).

of Americans to land on the Magdalen Island and to use the strand for fishing. This question was presented by the House of Assembly of Nova Scotia in 1841 to the British Government, which, in turn, presented it to the Law Officers of the Crown.^a The Law Officers did not find it free from difficulty and decided against the American right to land on these islands, not because the word in itself did not include the strand, but because it was thought, in view of the express provision for drying and curing on the southern coast of Newfoundland, that "such an important concession would have been the subject of express stipulation." The opinion on this point is as follows:

5th. With reference to the claim of a right to land on the Magdalen Islands, and to fish from the shores thereof, it must be observed, that by the treaty, the liberty of drying and curing fish (purposes which could only be accomplished by landing) in any of the unsettled bays, etc., of southern part of Newfoundland, and of the coast of Labrador is specifically provided for; but such liberty is distinctly negatived in any settled bay, etc., and it must therefore be inferred, that if the liberty of landing on the shores of the Magdalen Islands had been intended to be conceded, such an important concession would have been the subject of express stipulation, and would necessarily have been accomplished with a description of the inland extent of the shore over which such liberty was to be exercised, and whether in settled or unsettled parts, but neither of these important particulars are provided for, even by implication, and that, among other considerations leads us to the conclusion that American citizens have no right to land or conduct the fishery from the shores of the Magdalen Islands. *The word "shore" does not appear to be used in the convention in any other than the general or ordinary sense of the word, and must be construed with reference to the liberty to be exercised upon it, and would therefore comprise the land covered with water, as far as could be available for the due enjoyment of the liberty granted.*^b

If, then, the only provision of the treaty had been the one creating a liberty to take fish "on the shores of the Magdalen Islands" there could be no question that it would include the right to take in all coastal waters up to the land. There is nothing in the treaty which modifies this right, and it is submitted that the right to take fish on the shores of the Magdalen Islands includes the right to take them in the bays, harbors, and creeks of those islands. The fact that no question has ever arisen as to that right and that no effort has ever been made to exclude American fishermen from those bays until this question was framed, is most significant and instructive.

^a U. S. Case, Appendix, 1043 et seq.

^b U. S. Case, Appendix, 1048.

NINETY YEARS OF INTERPRETATION ADVERSE TO THE BRITISH CONTENTION.

In Sir Robert Bond's speech of April 7, 1905, delivered in the Colonial Assembly of Newfoundland, he said:

I believe I am correct in saying that it is *the first time* that this position has been taken and if I am correct in my interpretation of the treaty of 1818 the whole winter herring fishery of the west coast has been carried on for years by the Americans simply at the sufferance of the government of this colony.^a

As between individuals this statement would have placed him out of court on this Question. The law of England and the United States does not favor the slothful, and acquiescence for a long term of years creates a prescription. As between nations, contemporaneous and continuous construction should be equally controlling.

But the United States does not rest its case on mere acquiescence. For ninety years Great Britain has agreed with the United States that American fishermen were entitled to fish in those waters.

The Counter Case of the United States points out that "American fishermen at once began to engage in fishing in the bays, creeks, and harbours as well as in all the other waters of the west coast of Newfoundland."^b Some thirty American vessels were fishing in the bays of the west coast in 1820 and 1821 and were ordered off by French vessels of war. Great Britain, in the subsequent negotiations, confirmed the American right in the bays and France discontinued its interference with that right.

The Counter Case further points out that in 1857 Great Britain recognized the right of Americans to take fish in the bays of the west coast of Newfoundland.^c

It is difficult to see how the present contention of Newfoundland can be advanced in view of the express admission made in the British case before the Halifax Tribunal in 1877, which is set forth in the Counter Case of the United States.^d Newfoundland had every inducement in the Halifax proceedings to minimize the extent of fishing grounds secured by the treaty of 1818, because the colony was seeking compensation for the additional liberties extended to the United States by the treaty of 1871. Nevertheless it was in precise

^a U. S. Case, 245; U. S. Counter Case, Appendix, 414.

^b U. S. Counter Case, 89 et seq.

^c U. S. Counter Case, 99.

^d U. S. Counter Case, 101.

terms admitted that the treaty of 1871 only added "the liberty to take fish of every kind except shell fish" on that portion of the coast of Newfoundland "extending from the Rameau Islands on the south-west coast of the island *eastward and northerly to the Quirpon Islands.*"

A few other instances of similar admissions and similar construction of the treaty may be cited.

1852: Mr. Crowdy, writing from the Government House, Newfoundland, on September 22, 1852, to Sir John Pakington with reference to the French claim to an exclusive fishery, stated:

The very terms of the Declaration in question [1783] whilst forbidding the English fishermen to interrupt by their competition, or to injure the stages, etc., of the French, recognize their presence, and the whole question would appear to be settled by the concession on the part of our Government, to the citizens of the United States in the treaty of 1818 of the same rights which had been conceded to the French in that of 1783.^a

1876: In resolutions, adopted by the Executive Council of Newfoundland for transmission to the British Government, which are printed in the Journal of the Legislative Assembly of 1876, appears the following:

That the extent of the coast-line of the so-called French Shore, *inclusive of the sinuosities* of the Bays and Inlets, is little short of the one-half of the whole sea-coast of the island. Of this great distance the French occupy a small fractional part only; the British are scattered more or less throughout the whole length.

That the rights of fishing involved in the absurd claims of an exclusive fishery by the French are not limited to the residents of Newfoundland; they are the rights of the other provinces of British North America, *and also those of the United States, to the latter granted them under their Treaty with Great Britain in the year 1818.* England could not and would not have granted to the United States that which she had no right to grant, and much less would she deprive the inhabitants of the soil of rights she had granted to non-residents and to aliens.^b

1877: The British case before the Halifax Commission (1877) asserted that Americans prosecuted the herring fishery at Bonne Bay and Bay of Islands on the western coast, and stated further:

It may possibly be contended on the part of the United States that their fishermen have not in the past availed themselves of the Newfoundland inshore fisheries, with but few exceptions, and that they would and do resort to the coasts of that island only for the purpose of procuring bait for the Bank fishery. This may up to the present

^a U. S. Counter Case, Appendix, 229.

^b U. S. Counter Case, Appendix, 277-278.

time, to some extent, be true as regards codfish, but not as regards herring, turbot, and halibut.^a

The collector of customs at Amherst Harbor (Magdalen Islands) testified before the Halifax Commission that in the year 1854 over one hundred American fishing vessels entered Amherst Harbor and fished "with seines near the shore."^b This fishing was conducted under the provisions of the treaty of 1818, since the treaty of 1854 did not go into effect until March 16, 1855.^c

1886: In 1886 the collector of customs at Bonne Bay, Newfoundland, served upon the fishing schooner *Thomas F. Bayard*, while at anchor in that harbor, a printed notice which contained the following clause:

I am instructed to notify you that the presence of your vessels in this *port* is in violation of the articles of the international convention of 1818 between Great Britain and the United States in relation to fishery rights on the coast of Newfoundland.

During the same season the American fishing schooner *Mascot* was subjected to similar interference by the provincial authorities in Amherst harbor, Magdalen Islands. The facts out of which these cases arose, and the position of the United States with respect thereto, are fully set forth in the Case of the United States.^d

These two instances were promptly called to the attention of the British Government by Mr. Bayard, the Secretary of State, and in the course of the correspondence which ensued, Mr. Phelps, the American minister at London, wrote to Lord Iddesleigh, September 11, 1886, as follows:

These vessels were proposing to fish in waters in which the right to fish is expressly secured to Americans by the terms of the treaty of 1818 the former *in Bonne Bay* on the northwest coast of Newfoundland, and the latter *near* the shores of the Magdalen Islands.^e

On November 30, 1886, Lord Iddesleigh acknowledging Mr. Phelps letter of the 11th instant said with reference to these vessels:

The privileges manifestly secured to United States fishermen by the convention of 1818 in Newfoundland, Labrador and the Magdalen Islands, are not contested by Her Majesty's Government who whilst determined to uphold the rights of Her Majesty's North American subjects as defined in the convention are no less anxious and resolved

^a U. S. Counter Case, Appendix, 549-550. ^d U. S. Case, 190-194.

^b U. S. Counter Case, Appendix, 555.

^e U. S. Case, 192-193; Appendix, 837.

^c U. S. Case, Appendix, 28.

to maintain in their full integrity the facilities for prosecuting the fishing industry on certain limited portions of the coast which are expressly granted to citizens of the United States.^a

With reference to these incidents the British Counter Case dealing with Question Seven makes the following frank admission, after quoting in full a specimen of the warning notices:

These warning notices related first, to fishery rights and secondly to purchases in connection with fishery operations; and *so far as they referred to fishery rights* they were clearly improper in so far as they applied to treaty coasts. It is obvious therefore that from the withdrawal of these warning notices no argument can be adduced in favor of the American contention as to the existence of trading rights on the treaty coasts. It can not be construed as involving any admission as to the right to trade on the treaty coasts.^b

This admits the entire American contention under Question Six, for it will be observed that the warning notices relating to fishery rights begin with the words—

I am instructed to give you notice that the presence of your vessel *in this port* is in violation of the articles of the international convention of 1818.

1886: On March 19, 1886, after the expiration of the treaty of 1871, Sir L. S. West, under direction of Lord Rosebery, inquired of Mr. Bayard whether he would issue a notice to American fishermen that they were “now precluded from fishing in British North American territorial waters.”^a Both the British minister and Lord Rosebery had evidently overlooked the existence of the treaty of 1818 which admittedly gave Americans distinct rights in territorial waters of Newfoundland, Labrador, and the Magdalen Islands. Mr. Bayard, in his reply of March 23, 1886, called attention to this inadvertence in the following language:

In view of the enduring nature and important extent of the rights secured to American fishermen in British North American territorial waters under the provisions of the treaty of 1818, to take fish within the three-mile limit on certain defined parts of the British North American coasts, and to dry and cure fish *there* under certain conditions, this Government has not found it necessary to give to United States fishermen any notification that “they are now precluded from fishing in British North American territorial waters.”^c

Here was a general assertion of the right to take fish in British territorial waters.

^a U. S. Case, Appendix, 869.

^c U. S. Case, Appendix, 755.

^b British Counter Case, 66-67.

This would have been an opportune time for Great Britain to have called the attention of the United States to the contention, if any was then entertained by Great Britain, that *all* the bays of Newfoundland were closed to the fishermen of the United States, and that there was urgent necessity that they should be warned to that effect.

Sir L. S. West contented himself with acknowledging the receipt of Mr. Bayard's letter without making any such claim. Nor did the British Government, which desired "by every means in their power to avoid any friction which might be caused by the cessation of the privileges lately enjoyed by United States fishermen"^a ever think of this method of avoiding the anticipated friction, or ever question the broad and unqualified assertion in Mr. Bayard's letter.

1888: The proposed treaty of 1888^b is instructive as to the understanding of the United States, Great Britain, and Newfoundland concerning the bays of the treaty coasts. The negotiators of the treaty were of course fully advised as to all the contentions arising from the seizures in 1886 and 1887, and familiar with the discussions relating thereto. The British negotiators were Joseph Chamberlain, Sir L. S. West, and Sir Charles Tupper.

The bays, in which Americans were not at liberty to fish under the treaty of 1818, were dealt with, and provision was made for a joint commission to delimit the British waters, bays, etc. from which American fishermen were to be excluded. These were the bays "as to which the United States by Article I of the convention of October 20, 1818, between the United States and Great Britain renounced forever any liberty to take, dry and cure fish,"^c and nowhere in the treaty is there any provision or suggestion of delimiting the bays, harbors, and creeks of the treaty coasts.

Fortune Bay and Placentia Bay on the non-treaty coasts of Newfoundland are among the bays specifically dealt with and limits were prescribed within which it was proposed to withdraw them from American use. Nothing is said of St. George's Bay or of any other bay of the treaty coasts. No one conceived that the bays or harbors of those coasts required delimitation, because it was understood that the United States had rights in them throughout their entire extent under the treaty of 1818.

^a U. S. Case, Appendix, 754.

^b U. S. Case, Appendix, 39.

^c U. S. Case, Appendix, 40.

1898: The Newfoundland customs circular of March 18, 1898, contained the following clause:

You are to see that every fishing vessel of the United States which enters your port or any port within your jurisdiction, except it be within the above limits (i. e., Cape Ray and the Ramea Islands and Cape Ray and Quirpon Islands) for other than the purpose of shelter, repairing damage and of purchasing wood and obtaining water, shall obtain a license as set forth in the "foreign fishing vessels act" and shall pay for the same the fee of one dollar and fifty cents per registered ton, but if the *port* be within the above limits she may enter to take (catch) fish without a license.

Under the treaty of 1818, made between Great Britain and the United States, the fishermen of the latter country have liberty to catch fish on that part of the coast between Ramea Islands and Cape Ray and between Cape Ray and the Quirpon Islands, and of drying or curing fish in any unsettled parts within those limits.^a

1904: The correspondence between Great Britain and the Government of Newfoundland in the spring of 1904 concerning the French treaty of that year is a complete admission of the rights of American fishermen in the bays of the treaty coasts. By a despatch from Mr. Lyttleton, secretary of state for the colonies, received in Newfoundland 12th April, 1904,^b the Colonial Government was advised of the text of the clauses affecting Newfoundland in the treaty which had just been signed. Answering this despatch under date of 15th April, 1904, Governor Boyle replied:

Ministers request me to state that if the right of the people of this colony to its fisheries throughout the year is not preserved they cannot approve the arrangement. If British fishermen were prohibited from the winter fishery under convention or other instrument does not His Majesty's Government realize *that the whole winter fishery would be in the hands of Americans by virtue of treaty 1818 and British subjects must find themselves in most invidious and ruinous position. Ministers must press that close season shall only apply to concurrent right of French fishermen.*^c

Sir Edward Grey fixes the bays of the west coast as the places where the winter fishery was conducted.^d

Mr. Lyttleton's despatch of the 19th April, 1904, set at rest their anxiety concerning the winter fishery and showed that British fishermen would share therein after October 20, in each year, instead of its being wholly in the hands of Americans.

Sir Robert Bond was prime minister when Governor Boyle's despatch was sent and his conception of the present British contention

^a U. S. Case, Appendix, 331.

^b U. S. Counter Case, Appendix, 337.

^c U. S. Counter Case, Appendix, 338.

^d *Infra*, 252.

as to the effect of the treaty of 1818 must therefore be assigned to the period between April 15, 1904, and April 7, 1905.

1905: Premier Bond, in 1905, in announcing for the first time the present contention, admitted that Americans had fished, "for years, in the bays and harbours of the west coast of Newfoundland."^a

Mr. Morine, leader of the opposition, on the same day stated that if originally there was anything in the claim advanced by Sir Robert Bond, "the advantage had long been lost by the custom in usage of the two countries."^b

THE BOND THEORY NOT FAVORED BY GREAT BRITAIN OR NEWFOUNDLAND.

The Counter Case of the United States points out^c that Sir Robert Bond's contention was discredited in Newfoundland. It may be added that it also failed to convince the Government of Great Britain.

The controversy of 1905 began with a report which reached Mr. Root, then Secretary of State, that American vessels on register had been forbidden at Bay of Islands to fish on the treaty coasts. Mr. Root called the attention of Sir Mortimer Durand to this report, by note of October 12, 1905, pointing out that American vessels had fished there "*unmolested since 1818.*"

Mr. Root added:

It seems unfortunate that the government of Newfoundland should undertake to prohibit a practice justified by the construction of the various treaties relating to the Newfoundland fisheries *for more than a century* without any suggestion by the Government of Great Britain that that Government proposes any change of construction and without any exchange of views between the two governments upon the subject.^d

During the whole subsequent correspondence these assertions are not called in question. The words "treaty coast" are used and clearly include the "bays," for it was of the prohibition given at the Bay of Islands that Mr. Root was writing; and in his note of October 19, 1905, he called attention to a similar prohibition at Bonne Bay.^e

^a U. S. Counter Case, Appendix, 414.

^b U. S. Counter Case, Appendix, 425.

^c U. S. Counter Case, 102.

^d U. S. Case, Appendix, 964.

^e U. S. Case, Appendix, 966.

The right of American vessels sailing under fishing license was not called in question and the discussion arose from an attempt by subordinate Newfoundland officials to make a distinction "between registered and licensed vessels."^a As to this Mr. Root desired that they "be advised that they are entitled to make no such distinction." Although Premier Bond advanced his theory concerning the exclusion of American vessels from the "bays" of the treaty coast in April, 1905, no word of it appears in the voluminous correspondence between Great Britain and the United States during the three years following.

After the visit of Sir Robert Bond to Great Britain in 1907, and after the full discussion, which the colonial office had with him at that time, the failure of Great Britain to assert his theory amounts to a demonstration that the Government of Great Britain did not regard it as of any value.

Nor was Premier Bond able to convince his own associates in the Government of Newfoundland. During the years following Sir Robert Bond's invention, while the Government of Newfoundland was in controversy with the British Government concerning American rights under this treaty, they did not urge or even refer to this theory.^b

Undoubtedly it was a matter of discussion between Sir Robert Bond and his associates in the Government, but he did not secure their assent to putting it forward until September, 1907, and then it was mentioned by Governor McGregor as a contention of his prime minister.^c

Governor McGregor's telegram of September 8, 1906, to Lord Elgin is significant:

Chief desire of my responsible advisers is to prevent our fishermen from selling fish to or working for Americans. They earnestly urge proclamation of Act No. I of 1906 and undertake to apply it only to our own people and to leave in abeyance questions of the light house dues, customs entrance, nationality of American crews, purse seines, and undertake preservation of peace and without your sanction to enter into no case against Americans.^d

If there was any real ground for the present contention, it was far the most important that Newfoundland could advance, and all others faded into insignificance. But it was not considered by Gov-

^a U. S. Case, Appendix, 971.

^b U. S. Case, Appendix, 986 et seq.; U. S. Counter Case, Appendix, 341 et seq.

^c U. S. Case, Appendix, 1013, 1014.

^d U. S. Case, Appendix, 991.

ernor McGregor's "responsible advisers," of whom Sir Robert Bond was chief, as of sufficient importance to form a part of their "chief desire," nor to be dignified even by mention among the matters to be left "in abeyance."

If any question existed as to the full recognition by Great Britain of rights of American fishermen in the bays of the treaty coasts, it was set at rest by Sir Edward Grey's note to Mr. Reid of February 2, 1906, in which he insisted that the denial of commercial privileges to American fishermen did not entitle "American vessels to exemption from light dues *in the ports in which they fish.*"

Sir Edward Grey was equally precise in the same note in again fixing the bays as places where Americans may fish. He stated in regard to reporting at customs-houses:

* * *, but it must be remembered that, in proceeding to the waters in which the winter fishery is conducted, American vessels must pass in *close proximity to several custom-houses*, and that in order to reach or leave the grounds *in the arms of the Bay of Islands*, on which the fishery has been principally carried on during the past season, they have sailed by *no less than three custom-houses on the shores of the bay itself*. So that the obligation to report and clear need not in any way have interfered with a vessel's operations. It must also be remembered that a fishery conducted in the midst of practically the only centres of population on the west coast of the colony affords ample opportunities for illicit trade, and consequently calls for careful supervision in the interests of the colonial revenue.

* * * * *

It is, moreover, to the advantage of the American vessels engaged in the winter fishery *in the Bay of Islands* that they should report at a colonial custom-house. Owing to the extent and peculiar configuration of that bay, and owing to the prevalence of fogs, vessels that enter its inner waters may remain for days without the local officers becoming aware that they are on the coast unless they so report. In such circumstances it is difficult for the Colonial Government to insure to American fishermen that protection against lawless interference for which Mr. Root calls in the concluding part of his note.^a

In order to sail by three custom-houses in the Bay of Islands, a vessel must have passed at least ten miles through the bay and into the Humber Arm.

Sir Edward Grey evidently knew that the fishing grounds were inside the bay. The remark was not an inadvertence, for it is repeated in almost identical language in his note of June 20, 1907, to Mr. Reid.^b

^a U. S. Case, Appendix, 975.

^b U. S. Case, Appendix, 1006.

This note was a formal answer to Mr. Root's communication of June 30, 1906, which insisted in detail upon the contentions of the United States.^a The answer had been "deferred * * * until the arrival in this country of the Premier of Newfoundland to attend the Imperial Conference." It contained no reference to the Bond theory.^b

Undoubtedly Sir Robert Bond had fully developed his contention in his conferences with the British Government. Indeed this is made certain by Governor McGregor's letter to Lord Elgin of September 2, 1907, in which he stated that his lordship was aware that "my Prime Minister has consistently disputed the right of American fishermen to fish or trade in the bays, harbours, and creeks of the west coast," etc.^c

The circumstances, under which Premier Bond secured the assent of the British Government to putting it forward as a belated contention in this arbitration, are set out in the Counter Case of the United States.^d The insistence which made it a question before this Tribunal after the ninety years of uniformly adverse practical construction and after it had failed to produce conviction in any other mind than that which conceived it, is persuasive of the confidence with which it was held by the premier, but of nothing else.

It is under such conditions that the Question is submitted to this Tribunal.

RESULTS OF THE BOND CONTENTION.

The best test of the validity of a contention is an examination of the results which flow necessarily from it. If they are reasonable, the contention may well be deemed worthy of consideration; if they are absurd and preposterous, the opposite is true. The United States submits that the results, which would necessarily flow from the adoption of the Bond contention, are absurd and preposterous. The argument for the United States might well be rested on the consideration of these results alone.

^a U. S. Case, Appendix, 978.

^b U. S. Case, Appendix, 1004.

^c U. S. Case, Appendix, 1014.

^d U. S. Counter Case, 103-104.

First. The result, if the contention of Sir Robert Bond was sustained, would be that the treaty of 1818 *did not deal at all with the bays, harbors, and creeks* of the western coast of Newfoundland, and of the Magdalen Islands.

By this contention they were not secured to the United States, and its fishermen have no rights in them.

Neither was the liberty to take fish in these bays renounced by the United States.

The renunciatory clause is as follows:

And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America *not included within the above mentioned limits.*

The bays, creeks, and harbors, of the west coast of Newfoundland, and of the Magdalens, *are* "included within the above mentioned limits" i. e., from Cape Ray to the Rameau Islands and from Cape Ray to the Quirpon Islands, and on the shores of the Magdalen Islands, and are, therefore, *not* covered by the renunciatory clause.

The Tribunal is asked to violate all canons of construction and to hold that in a treaty, entered into to settle "differences which have arisen respecting * * * certain coasts, bays, harbours, and creeks," these important bays, harbors, and creeks of the west coast of Newfoundland, were overlooked altogether. American lawyers have been taught differently by English decisions.

In re Harrison (1885, 30 Ch. Div., 390, pp. 393, 394), Lord Esher says:

There is one rule of construction which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to read to a testacy, not to an intestacy. This is a golden rule.

If Sir Robert Bond's contention is adopted then the treaty of 1818, in one of its most important particulars, was a solemn farce; the distinguished plenipotentiaries who had assembled as representatives of two great powers to compose differences existing between them had followed the example of the King of Spain and his forty

thousand men. They assembled to put at rest the question of the effect of the War of 1812 upon American fishing liberties, and to prevent the recurrence of another war. Everyone believed for nearly ninety years that they had been successful in putting that question at rest forever.

It was reserved for Sir Robert Bond to discover that they had been unsuccessful and that two countries had slept in peace for well nigh a century in blissful ignorance of their insecurity.

Second. The result would be that American fishermen would have no right by this treaty to seek shelter in any of the bays, harbors, and creeks, of the west coast of Newfoundland, and of the Magdalen Islands, off which they are admittedly at liberty to fish.

The proviso at the end of Article I of the treaty is as follows:

Provided, however, That the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter, and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever.

“Such bays or harbours” are of course the bays and harbors last mentioned in the treaty, fishing in which had been “forever” renounced. These are the bays and harbors which are “*not* included within the above-mentioned limits,” i. e., not on the treaty coasts. Accordingly, if the Bond contention were correct, American fishing vessels may seek shelter and repair damages and procure wood and water in every bay and harbor of His Majesty’s dominions except those of the west coast of Newfoundland, and of the Magdalen Islands, off which admittedly they have a right to fish.

Under this contention, although American vessels may engage freely in fishing off the treaty coasts, the bays and harbors would be closed to them in time of danger and disaster. They may fish, but they would have no right under this treaty to enter bays for shelter or repairs, wood or water, until they have passed around to the south, beyond the Rameau Islands, or to the north beyond the Quirpon Islands.

Third. The result would be that, on the southern coast of Newfoundland the American fishing vessels would have the right to take fish outside the bays, creeks, and harbors, from Cape Ray to the Rameau Islands, but would be excluded from fishing in those bays,

harbors, and creeks. Nevertheless, they would under the treaty have the right "to dry and cure fish in any of the unsettled bays, harbours and creeks" of the same coast. It is inconceivable that it was intended to exclude them from fishing in waters to the very shores of which they may freely resort for the purpose of drying and curing their fish.

QUESTION SEVEN.

Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I of the treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

SCOPE AND MEANING OF THE QUESTION.

The positions of the United States and Great Britain, as presented in their respective Cases and Counter Cases, differ so widely in regard to the scope and meaning of this Question that it is desirable that the grounds, on which the position of the United States rests, be discussed herein with some detail.

The British Case assumes throughout that the United States must prove that commercial privileges were secured by the treaty of 1818 in order to sustain its contention under this Question. The United States does not so understand the Question.

As pointed out in the discussion of Question Three, the United States has never asserted, and does not now assert, that general commercial privileges for its fishing vessels constitute any part of the liberties referred to in Article I of the treaty of 1818. That treaty neither conferred nor—as the United States contends—denied commercial privileges. It was a treaty concerning a fishing liberty, carrying the rights necessarily incidental to such liberty, and did not concern itself with commercial privileges. General commercial privileges, so far as the British North American colonies were concerned, were first extended to the inhabitants of the United States by the British Order in Council of November 5, 1830.^a Reciprocal commercial privileges were granted by the United States for the benefit of the inhabitants of those colonies, by the Act of Congress, May 29, 1830, and by a presidential

^a British Case, Appendix, 570.

proclamation of October 5, 1830.^a By subsequent independent and concurrent action of the two Governments, these commercial privileges received a large extension in the course of years "in the interest of propinquity."^b The importance attached to them by the United States and its belief that its fishing vessels were entitled to exercise them is shown by the message of President Grant of December 5, 1870,^c and by the Act of Congress of March 3, 1887.^d

In the view of the United States it is unnecessary to consider the development of the trade relations between the two peoples; no burden is placed upon the Tribunal of examining the scope, character, or permanency of these reciprocal privileges, because the Question under consideration assumes as the basis on which it rests that commercial privileges have been accorded and do exist; and the inquiry presented to the Tribunal concerns only their exercise by certain of the inhabitants of the United States. The words of the Question are:

Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I of the treaty of 1818 entitled to have for those vessels * * * the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

It is manifest that the Tribunal is not called upon to determine by what *agreement* the privileges are accorded, and the intentional generality of the word "otherwise" shows that no such determination is called for or permissible. Whatever the privileges are, and however they were accorded, and whatever others may hereafter be accorded, it is of importance to ascertain whether during their continuance any of the inhabitants of the United States, duly authorized by their own Government to take advantage of them, can be deprived of them by reason of anything contained in, or fairly to be implied from the treaty of 1818. To this extent the British contention, that "it is the construction of that treaty alone which is submitted to the judgment of this Tribunal," is correct.^e

The situation is this: A liberty has been granted by treaty entitling the inhabitants of a nation to enter the jurisdiction of the nation granting the liberty for the purpose of prosecuting there a gainful vocation. In addition to this liberty, certain privileges have been

^a British Case, Appendix, 786.

^b U. S. Case, Appendix, 764.

^c U. S. Case, 156-158.

^d U. S. Case, Appendix, 96

^e British Counter Case, 61.

accorded to the inhabitants of the first country whereby they have also the right to enter the same jurisdiction for the purpose of trade. The question is whether these inhabitants, when exercising the treaty liberty, are precluded from enjoying at the same time these trading privileges; or, when enjoying such privileges, are prohibited from exercising the treaty liberty. In other words, the question is whether, as to the matter of commercial privileges now or hereafter accorded, there is anything in the treaty of 1818 which justifies a discrimination by Great Britain against the inhabitants of the United States who are exercising the liberty granted by that treaty. The issue presented by the Question is formulated in the British Case, with substantial exactness in the closing part of the statement of the contention of Great Britain.

The contention begins:

Great Britain contends that American fishermen can not claim as of right to exercise any liberties in British territorial waters, unless those liberties were granted by the treaty of 1818; that no commercial privileges were so granted.^a

It should be observed that in the above extract Great Britain confuses commercial privileges with liberties under the treaty, but, as pointed out in the Counter Case of the United States in the discussion of Question Three, the only liberties referred to in the treaty are the liberties of taking, drying, and curing fish. This failure to distinguish between *treaty liberties* and *commercial privileges* indicates, in the view of the United States, a misapprehension on the part of Great Britain of the correct meaning of the Question.

As above stated, the United States does not contend that general commercial privileges were granted by the treaty of 1818 and denies that they are founded upon it. But the second part of the British contention:

And that the exercise of commercial privileges by American fishing vessels would be contrary to the intention of that treaty—

raises the question with exactness, if the words "American fishing vessels" are understood to mean "the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of fishing."

Certain other observations are suggested by a reading of Question Seven.

^a British Case, 127.

**THE UNITED STATES MAY AUTHORIZE THE EXERCISE OF WHAT-
EVER COMMERCIAL PRIVILEGES ARE ACCORDED.**

Question Seven assumes, as a condition precedent, that the United States has the power to authorize the exercise by its inhabitants of such commercial privileges as now are or may hereafter be accorded, and to determine the due and proper method of such authorization. This is clear from the words, "when duly authorized by the United States in that behalf."

It is not claimed that the United States by its authorization can vary or exceed the rights accorded, but that, as to such rights, the authority for their exercise rests with the United States.

This authorization is generally in the form of registration, which gives the right both to trade and to fish. The majority of American vessels resorting to the treaty coast are on register; and this was admitted by Sir Edward Grey in his memorandum of February, 1906, in which he stated:

It is admitted that the majority of the American vessels lately engaged in the fishery on the western coast of the colony were registered vessels, as opposed to licensed fishing vessels, and as such were at liberty both to trade and to fish.^a

It is to be noted that Sir Edward Grey did not follow this by a denial that American vessels can have the right both to trade and to fish, but said that because they *may* trade they ought to *enter at the customs*.

In some instances American vessels carry licenses to fish, and in some of these licenses there is added permission "to touch and trade," but the controversy arose with reference to vessels on United States register.^b The present Question is substantially the same under the two forms of authorization.

**RIGHTS OF THE UNITED STATES, AND NOT THE RIGHTS OF VES-
SELS, ARE TO BE DETERMINED.**

The British Case persistently deals with the Question as if it were a question of the rights of vessels. It states:

The treaty confers no rights upon American *vessels*—

* * * * *

And the question is whether the *vessels* used by such American fishermen are entitled, as of right, to such commercial privileges on the treaty coasts as are from time to time accorded to trading vessels.

* * * * *

^a U. S. Case, Appendix, 974.

^b U. S. Case, Appendix, 964-971.

The United States contends that American fishing *vessels* resorting to British territorial waters under the terms of the treaty are entitled, as of right “—

If, in speaking of a vessel's rights, the British Case but used “a convenient and customary form of describing the owner's or master's right and duties in respect of the ship” it might well be said, as Mr. Root, replying to Sir Edward Grey, June 30, 1906,^b did say “it is probably quite unimportant which form of expression is used.” But this is not what the British Case does. After denying in the discussion of Question Two that American vessels have any rights, it proceeds to discuss this Question as if all fishing and trading rights of the United States were rights belonging to vessels, and as if the employment of a vessel as a fisherman or as a trader had the effect of fixing and determining the rights of the inhabitants of the United States who own such vessel. It may fairly be said that the British contention under this Question has no other foundation than this classification of vessels. It is, therefore, important to point out again that the Question is:

Are the *inhabitants of the United States* whose vessels resort to the treaty coast * * * entitled to have for those vessels—

It has already been shown, under Questions One and Two, that the United States is the real party in interest and that the words “inhabitants of the United States” are not words of limitation, but words aptly describing the sovereign power in which the treaty liberties are vested. The Question in its effect and essence then is this: Is the United States entitled to have for the inhabitants thereof, &c.

It may be contended that the words, “trading vessels”, refer to some rights reserved exclusively to vessels having that character and no other. Then this Question is an absurdity. If the United States “by agreement or otherwise” secured some commercial privileges, which by the terms of the agreement could only be exercised by vessels exclusively used in trading, then it is preposterous to ask the Tribunal to determine whether they can be exercised by vessels engaged in fishing. No question whatever would be presented. The Question should bear a reasonable construction and one which will present a real issue, which this Question certainly does.

^a British Case, 127.

^b U. S. Case, Appendix, 979.

If vessels exclusively used in trade were intended, then the word "generally" is unnecessary, and the question should have read—"accorded by agreement or otherwise to vessels engaged *only* in trade."

This is the exact language in which the British Counter Case erroneously puts the Question.^a It is not the language or the substance of the language of the Question. Nevertheless it seems to have been thought necessary thus to transform the Question, as indeed it is, in order to maintain the British contention. No such absurdity is presented for determination. This transformation is not merely begging the question, it is annihilating it.

It may be noticed in passing, that the Order in Council of 1830, giving effect to these reciprocal arrangements, did not give them to "American trading vessels" as summarized in the British Case,^b but provided, as there quoted—

that the *ships* of and belonging to the said United States of America may import from the United States aforesaid, into the British possessions abroad, goods, the produce of those States; and may export goods from the British possessions abroad to be carried to any foreign country whatever.

The order in council nowhere mentioned "trading vessels," but "ships of the United States" are four times mentioned and "vessels of the United States" once.^c

Furthermore, President Jackson's proclamation of October 5, 1830, pursuant to the Act of Congress of May 29, 1830, opened the ports of the United States "to British vessels coming from the said British colonial possessions," and their cargoes. Both the act and the proclamation repeatedly used the words "British vessels" and "vessels of the United States," and the proclamation recited that satisfactory evidence—

has been received by the President of the United States that * * * the Government of Great Britain will open for an indefinite period the ports in its Colonial possessions * * * to the vessels of the United States and their cargoes.

There is no limitation of vessels to those of a particular class, and no intimation, for example, that an American vessel authorized to trade as well as fish might not sail directly from the fishing grounds

^a British Counter Case, 61.

^b British Case, 129, 130.

^c British Case, Appendix, 570-571.

with its cargo of fish to British colonial ports, and dispose of such cargo.^a As previously stated, the United States does not understand that the act, proclamation, and order in council are submitted to the Tribunal for construction, but it is deemed proper to point out the erroneous assumption in the British Case that they applied only to trading vessels.

QUESTION RELATES ENTIRELY TO TREATY COASTS.

The British Case correctly states that this Question "relates only to the treaty coasts," but, in the presentation and historical discussion of the Question, it deals almost entirely with the non-treaty coasts.^b As stated in the Counter Case of the United States:

If the discussion of this Question is to be confined within its proper limits, it is desirable that its application to the treaty coasts, in distinction from the non-treaty coasts should be borne in mind."^c

These considerations relieve the United States of the necessity of considering a large amount of matter introduced in the British Case and Counter Case, which is irrelevant, or, if relevant at all, only so by way of illustration.

BRITISH POSITION CHANGED IN COUNTER CASE.

To add to the confusion resulting from attributing to the United States positions which it never has taken, and from basing arguments upon such assumed positions, the British Counter Case apparently seeks to withdraw from the consideration of the Tribunal one of the issues presented by the British Case, which is the only one the United States deems to be of any importance. The British Counter Case reverts to the first part of the British contention and omits the second part entirely. It assumes that the United States will attempt to prove that Article I of the treaty of 1818 gives commercial privileges on the treaty coasts and that it must do so in order to secure an affirmative answer to the Question. It omits from discussion the contention of the British Case^d that "A liberty to exercise commercial privileges

^a U. S. Case, Appendix, 1123-1126.

^b British Case, 127.

^c U. S. Counter Case, 106.

^d British Case, 146.

is not in accordance with the tenour of the treaty," and fails again to state any grounds upon which that contention can be based. It entirely ignores the language of the Question and wins a bloodless victory over an antagonist of straw. It lays stress on the first proposal of the American negotiators of the treaty of 1818, that the purchase of bait should be included with the privilege of seeking shelter and of procuring wood and water, forgetting that those privileges were sought on the non-treaty coasts only. It ignores the statement of the British Case concerning the commercial privileges accorded in 1830 and also ignores the long-continued existence and development of commercial intercourse between the United States and the colonies, and assumes that "commercial privileges on the treaty coasts accorded by agreement or otherwise" must refer solely to an agreement contained in that treaty which makes no reference to commercial privileges.

The United States does not concur in any such statement of the Question.

THE REAL ISSUE INVOLVED.

From the foregoing consideration and analysis of the positions taken by the United States and Great Britain in their respective submissions of this Question, it is apparent that its scope and meaning have become the principal subjects of controversy. If the United States were to adopt the construction urged by Great Britain, either as originally presented in the Case or as modified by the Counter Case, the Question would not require an international tribunal to decide it. The United States has never claimed, as suggested by Great Britain, and does not now claim, that Article I of the treaty of 1818, conferred general commercial privileges. No evidence has been laid before the Tribunal, which, directly or inferentially, can be construed into an assertion by the Government of the United States of such a position, which would remove the subject from the field of controversy. It is unreasonable to presume that a question, based upon such premises, would have been presented to this Tribunal.

The meaning of the Question, as understood by the United States, raises an issue as to whether there is anything in the treaty of 1818, which justifies Great Britain in discriminating against the use, by inhabitants of the United States, of the same vessel for trading and for fishing purposes.

This is the real issue presented by Question Seven; and the United States, resting upon the language of the treaty of 1818 and upon the nature of the fishing liberty and of commercial privileges, repeats that the treaty can not be interpreted as meaning that the inhabitants of the United States are not entitled to have for their fishing vessels, when duly authorized in that behalf, the commercial privileges accorded to American trading vessels generally; that the exercise of the fishing liberty under the treaty is in no way inconsistent with the exercise of commercial privileges; and that the inhabitants of the United States, whose vessels are permitted to trade, are not debarred from using the same vessels in the exercise of their treaty liberty of fishing.

NORTH ATLANTIC COAST FISHERIES.

ARGUMENT

PRESENTED ON THE PART OF

THE GOVERNMENT OF HIS
BRITANNIC MAJESTY

TO THE

TRIBUNAL CONSTITUTED UNDER AN AGREEMENT

SIGNED AT WASHINGTON ON THE 27TH DAY OF JANUARY, 1909, BETWEEN
HIS BRITANNIC MAJESTY AND THE UNITED STATES OF AMERICA

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THE ARGUMENT OF HIS BRITANNIC MAJESTY'S GOVERNMENT.

PRELIMINARY.

His Majesty's Government proposes in this written Argument to state its points and to refer to the evidence upon which it relies. This has to a great extent been already done in the Case and Counter-Case of His Majesty's Government, and to these documents His Majesty's Government desires to refer as containing part of the Argument on its behalf. His Majesty's Government also proposes in this Argument to deal with the contentions of the United States Government so far as they have been disclosed in its Case and Counter-Case.

In the Counter-Case of the United States at page 1 the following passage occurs:—

“The view taken on the part of the United States as to the function and character of the printed Case and Counter-Case, required by Article VI of the Special Agreement, has been that the Case should present the evidence relied on in support of the position taken with respect to each question, and that the Counter-Case should deal with the evidence in reply to the Case of the other party, postponing the presentation and discussion of questions of law and of the issues raised by the evidence until the printed and oral arguments. The Case of the United States was prepared in accordance with this view, and in the preparation and presentation of its Counter-Case the United States will follow the course indicated. In order, therefore, that the Counter-Case may not trespass upon the province of the arguments, no attempt will be made therein to rely to the portions of the British Case which deal with questions
2 of law or to argue the issues presented by the evidence, such questions being reserved for consideration in the printed and oral arguments of the United States, in which also precedents and legal authorities relied upon by the United States will be presented and discussed.”

In the view of the frame of the Case and Counter-Case of the United States Government, a detailed consideration of its contentions on points of law and of fact must necessarily, to a great extent, be reserved for the oral argument.

QUESTION ONE.

RIGHT OF REGULATION.

To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said article, which the inhabitants of the United States have for ever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of

(1) the hours, days, or seasons when fish may be taken on the treaty coasts;

(2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts;

(3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance—

(a.) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said article 1 the inhabitants of the United States have therein in common with British subjects;

(b.) Desirable on grounds of public order and morals;

(c.) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of

(1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts; or

4 *(2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts; or*

(3) any other limitations or restraints of similar character—

(a.) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b.) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(c.) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

THE CONTENTIONS.

The treaty of 1818 gave to the inhabitants of the United States certain liberties in British waters and upon British land to be exercised in common with British fishermen.

It is agreed that authoritative regulations governing the action of all these fishermen are necessary, not only for the purpose of ensuring reasonable respect for mutual rights, but for the preservation of the fisheries from depletion and destruction.

His Majesty's Government contends that effective authority to make reasonable and necessary regulations to be observed by both British and United States fishermen in the waters and upon the land affected by the treaty of 1818 exists; and that such authority is vested in the Power in whom the sovereignty over the waters and shores is vested, that is, in Great Britain. In the view of His Majesty's Government the treaty imposes no limitation whatever on British sovereignty, although an undertaking by Great Britain is implied not to exercise that sovereignty in such a way as to nullify the liberty of fishing conferred by it, or to discriminate unfairly against American fishermen. Great Britain holds that British legislation is binding on all persons within this British jurisdiction, and that if objection is to be taken to it on the ground that it unfairly affects privileges granted by the treaty, that must be done by diplomatic representation. The legislation remains valid until repealed or modified by Great Britain.

The United States Government, on the other hand, contends that the treaty has imposed a direct limitation on the sovereignty of Great Britain so far as American fishermen are concerned, and that no regulations binding on them can be made without the assent of the United States.

It is obvious that in practice Great Britain cannot subject her own fishermen to restrictions from which American fishermen are exempt. The difference, therefore, between the views of the two Governments is of importance, for, if the contention of the United States were to prevail, it would not be possible for Great Britain to make any fishery regulations at all without the previous assent of the United States.

There is nothing in the express terms of the treaty which supports the contention that any limitation is imposed by it on the sovereignty of His Majesty, and it is submitted that no limitation of this character ought to be read into it merely by implication. Nor was there anything in the situation of the parties at the time of the treaty from which such a limitation could be implied.

In the Counter-Case of the United States it is claimed that the question before the Tribunal relates only to the right of fishing.

But the right to resort to British shores for the purpose of drying and curing is given by the same provision, and must be governed by the same considerations. If American fishermen are in any respect exempt from British jurisdiction on the treaty waters they are equally exempt from that jurisdiction on the shores.

LANGUAGE OF THE TREATY.

His Majesty's Government has already presented to the Tribunal in the British Case the Argument which demonstrates (as is submitted) that the language of the treaty must be construed as contended for by Great Britain, and the Tribunal is respectfully referred to pp. 40-48 of that Case.

In substance the Argument is—

1. It is a general principle that in the absence of any express provision limiting the fundamental sovereign rights of a State a treaty must be so construed as to give effect to those rights.^a

This principle is well illustrated by the argument of Mr. Rush in the dispute which arose as to the nature and extent of the French fishery on the Newfoundland coast. In a memorandum handed to the representatives of the British Government on the 29th March, 1824, Mr Rush contended, on behalf of the United States, that there could be no grant of an exclusive right of fishery in the French treaty of 1783, because the sovereignty of Great Britain over Newfoundland could not be diminished except by express words. He said:—

“The United States insist, on the other hand, that Great Britain never could have intended by her treaty of 1783 with France to grant a right of fishing, and of drying and curing fish, on the western coast of the island to French fishermen exclusively, but that the right of British subjects to resort there *in common* must necessarily be implied. That a contrary construction of the instrument cannot be received, the sovereignty of the whole island, without any exception, having been fully vested in Great Britain, and even confirmed by this very treaty. That it can never be presumed that she intended so far to renounce or in anywise diminish this sovereignty as to exclude her own subjects from any part of the coast. That no positive grant to this effect is to be found in the treaty, any more than in the treaty of Utrecht, and that the claim of France to an exclusive right, a claim so totally repugnant to the sovereign rights of Great Britain, can rest on nothing less strong than a positive grant.” (United States Counter-Case, App., p. 125.)

2. A canon of construction of treaty grants, such as that in question, is that the grant of a right or liberty to subjects of one State, to do certain acts in the territory of another State, does not of itself

^a Hall's International Law, 5th edition, pp. 339, 340.

confer exemption from the jurisdiction of the State in which those acts are to be done.

A common instance is a grant of a liberty to enter foreign territory and to trade there. Grants such as this do not imply exemption from the local law, nor freedom to act as such person pleases. They are made on the terms that they must be exercised subject to the local laws which from time to time regulate trade in that territory.

3. Other treaties between Great Britain and the United States have invariably been construed on this principle. The treaties of 1783 and 1794 alike contain clauses giving rights to the subjects of one of the parties to go into the territory of the other. But it has never been suggested that such treaty permission in any way affected the sovereign power of each nation to enact such laws as it thought proper. Persons exercising these rights were subject to the laws in force for the time being. (British Case, App., pp. 13, 16.)

4. The treaties of 1854 and 1871, between Great Britain and the United States, furnish further examples of similar treaty concessions, and it is probable that the international relations of every civilised nation in the world are affected by treaties of the same character. If it were to be held by the Tribunal that grants of this character carried with them immunity from local legislation, difficulties and disputes would at once arise in every part of the world. (British Case, App., pp. 36, 37.)

5. The particular language of the treaty of 1818 furnishes special reason for applying to it the principles of interpretation above referred to. For the provision says expressly that the liberties granted to American fishermen are to be enjoyed "in common" with British subjects. These words appear to be well adapted to the purpose for which they were no doubt used, namely, to indicate that the British and American fishermen were to take fish on a footing of equality. That purpose, however, would be unattained if the effect of the treaty was that British fishermen were required to observe the regulations necessary and appropriate for the protection and preservation of the fisheries, and that American fishermen could do as they pleased unless the United States Government concurred in framing regulations.

In the United States Case (p. 64) it is argued that the words "in common" cannot be supposed to have been inserted—

"for any purpose other than to negative the presumption, which otherwise might have arisen, that the American fishermen in the exercise of the fishing liberties reserved to them by the treaty were at liberty to take precedence over the British fishermen in those waters or crowd out the British fishermen from the fishing grounds."

It is submitted that this argument unduly narrows the effect of the words used. The obvious meaning of the provision is that American fishermen were to have access to these fisheries to the same extent as British fishermen and subject to the same regulations.

8 If, therefore, the question now under consideration is to be determined by examination of the language of the treaty only, it is incontrovertible that it must be answered in conformity with the contention of His Majesty's Government.

ARGUMENT OF UNITED STATES AS TO CONSTRUCTION OF TREATY.

The argument of the United States in effect is, that the ordinary rules of construction are not to be applied to the treaty of 1818; that the treaty is of a peculiar character and that the plain language of it must give way to extraneous considerations to which there is no reference whatever in the treaty itself.

It is claimed that the treaty was a partition of the fisheries between two joint owners; that it was nothing more than a mutual acknowledgment of antecedent rights; and that, for these reasons, Great Britain can have no right to legislate in such a way as to bind American citizens when exercising the treaty rights.

His Majesty's Government submit that the treaty cannot be construed in this way, in any view of the facts, since the language is not ambiguous, and contains no reference whatever to the limitation now sought to be implied.

But apart from that objection His Majesty's Government challenge the facts on which the whole contention is founded. They deny absolutely that the treaty was in any way a partition of the North American fisheries. It has been pointed out that the treaty itself lends no colour to this suggestion, and it will be found that there is no support for it in the transactions of the time. Indeed, the contention on which the United States now relies was never put forward in any communication to His Majesty's Government until thirty-one years after the treaty of 1783. It originated with Mr. John Quincy Adams in 1814 during the controversy which arose as to the effect of the war of 1812 on the liberties granted in 1783. It did not commend itself to the majority of his colleagues at that time but was propounded by them in default of any better argument against the refusal of Great Britain to recognise the continuance of the liberties granted in 1783. It has never been accepted by Great Britain; on the contrary, it has been expressly repudiated on every single occasion on which it has been brought forward.

9 The fact is that the idea of the treaty of 1783 being a partition of these fisheries between two joint owners is incompatible with the whole position of the two parties at the time. The thirteen colonies, which eventually became known as the United

States, proclaimed their independence in 1773, and from that date onwards exercised the powers of independent sovereigns over the territories within their jurisdiction as then constituted. But they had no rights of any kind over the territories of the other American colonies which remained loyal to the British Crown, and within whose territories were included the whole of the fisheries now in dispute. By their assumption of independence in 1776, the inhabitants of the thirteen colonies had given up any rights as British subjects in other parts of the British Empire, and from that time onward they had no more rights in the other parts of British North America than they had in England, or in the British possessions in the East Indies.

Moreover, the ownership of the fisheries and of the shores adjoining them was, before the war, in the Crown of England, and not in the various territories forming the British Empire, or in the inhabitants of those territories. It is impossible to contend that there were any persons or bodies of persons entitled as co-owners with the King of England before the Declaration of Independence, or after that date.

In view, however, of the importance attached to this contention in the Case of the United States, it is thought proper to examine it in some detail, to point out the circumstances in which it originated, and to call attention to the facts bearing on it.

ORIGIN OF PARTITION ARGUMENT.

The evidence before the Tribunal establishes that the idea of partition as has been said was first suggested by Mr. John Quincy Adams at a meeting of the American Commission on the 1st November, 1814. His views are explained by the following extracts from his language upon three occasions:—

“We contended that the whole treaty of 1783 must be considered as one entire and permanent compact, not liable, like ordinary treaties, to be abrogated by a subsequent war between the parties to it; as an instrument recognising the rights and liberties enjoyed by the people of the United States as an independent nation, and containing the terms and conditions on which the two parts of one
10 empire had mutually agreed, thenceforth, to constitute two distinct and separate nations. In consenting, by that treaty, that a part of the North American continent should remain subject to the British jurisdiction, the people of the United States had reserved to themselves the liberty, which they had ever before enjoyed, of fishing upon that part of its coasts, and of drying and curing fish upon the shores, and this reservation had been agreed to by the other contracting party.” (British Counter-Case, App., p. 150.)

“It was obvious that the treaty of peace of 1783 was not one of those ordinary treaties which, by the usages of nations, were held to

be annulled by a subsequent war between the same parties; it was not simply a treaty of peace; it was a treaty of partition between two parts of one nation, agreeing thenceforth to be separated into two distinct sovereignties. The conditions upon which this was done constituted, essentially, the independence of the United States; and the preservation of all the fishing rights, which they had constantly enjoyed over the whole coast of North America, was among the most important of them." (British Case, App., p. 65.)

"The whole fishery, as well without as within the special territorial jurisdiction, had been the common property of the British empire: so had been the whole territory to which it had been incidental. By the treaty of separation, the territory was divided, and two separate sovereign jurisdictions arose. The fishery bordered upon both. The jurisdictions were marked out by the boundary line agreed upon by the second article of the treaty. The fishery was disposed of in the third article. As common property, it was still to be held in common. As a possession, it was to be held by the people of the United States, as it had been held before." (British Counter-Case, App., p. 167.)

The facts on this point have been set out in the British Counter-Case, pp. 17-19, to which the Tribunal is respectfully referred. It is there stated that Mr. Russell (one of Mr. John Quincy Adams' colleagues at Ghent)—

"expressed his entire dissent from Mr. Adams' view, and stated that in his opinion the point was not tenable. The opinions of other members of the Commission to the same effect might be referred to." (British Counter-Case, p. 18.)

These other opinions may now be noted. The Commissioners were Messrs. Adams, Bayard, Clay, Russell, and Gallatin. On the 10th November, 1814, Mr. Adams procured the signatures of all of them to a Memorandum for the British Commissioners based upon his idea; but the other documents show that this Memorandum was assented to by them purely for the purpose of negotiation and not as stating their view.

11 On the 28th November Mr. Adams made in his diary a reference to a consultation with his colleagues as follows:—

"I said that my reluctance at granting the navigation of the Mississippi arose merely from the extreme interest that Mr. Clay and the Western people attached to it; that as to the ground we had taken upon the fisheries, I believed it firm and solid. I had put my name to it, and considered myself as responsible for it. But when some of my colleagues, who had also put their names to it, told me, in this chamber, among ourselves, that they thought the ground untenable, and that there was nothing in our principle, I found it necessary to mistrust my own judgment, particularly after the enemy had given us notice that they meant to deprive us of the fisheries in part, unless a new stipulation should secure them." (British Counter-Case, App., p. 140.)

On the 10th December, Mr. Adams entered in his diary a reference to another consultation as follows:—

“Mr. Gallatin said that we should certainly lose that part of the fisheries; that our ground for claiming them was untenable, and we never could support it; that he was very sorry it had ever been stipulated in the Peace of 1783, and he would not have accepted it as an offer.

“I told him that my name was to an official paper assuming the ground which he now pronounced untenable, and so was his.

“He said that we had only assumed it as the principle upon which our Government had instructed us not to bring the fisheries into discussion; that he did not consider himself as pledged to it at all as his own opinion.

“I told him that I was pledged to it as mine; and believed the ground to be perfectly tenable and solid.” (British Counter-Case, App., p. 143.)

On the 14th December, Mr. Adams, referring to a further consultation with reference to the fisheries, entered in his diary as follows:—

“I finally told my colleagues that I saw the difference between them and me was, that they had determined ultimately to give up the point, and I had not. I believed the ground we had originally taken to be good and solid. I could make no distinction between the different articles of the Treaty of 1783. If I admitted this day that a half of one of its articles was abrogated by the war, I should give the enemy an argument to say to-morrow that the other half is abrogated equally. If we gave up the liberty to-day, we might be called to give up the right to-morrow. Our instructions were in general terms. They authorized no such distinction as that now made, and no new instruction concerning the fisheries has been given us, since our Government knows the pretension of Great Britain.

“Mr. Gallatin said he had always thought our ground upon that point untenable, that I had now almost a majority against me, and he did not wish we should commit ourselves to anything pre-
12 cluding us from abandoning our ground at last. Mr. Russell said that he considered everything of a permanent nature and founded on natural right in the Treaty of 1783 as not affected by a subsequent war; but privileges granted by the treaty, and which we should not have enjoyed without it, he thought were abrogated by war. (British Counter-Case, App., p. 147.)

“I said there was no grant of new privileges in the treaty. The liberties, as well as the rights, were merely a continuation of what had always been enjoyed. It was necessary for the fishermen to go to the part of the coast frequented by the fish, and when, by the independence of the United States, it became a foreign jurisdiction, we had a right to reserve the liberty of continuing to fish there, and the circumstance of the jurisdiction alone occasioned the change of the expression.

“Mr. Clay said he did not wish to make up his mind upon the subject until it should be absolutely necessary. He said we should make a damned bad treaty, and he did not know whether he would

sign it or not; but he could draw in five minutes an article agreeing to negotiate concerning the Mississippi and the fisheries without impairing our claim to them by the Treaty of 1783. He drew an article accordingly, which I read, and told him I had no other objection to it than that it would be instantly rejected by the British Plenipotentiaries. I further said that as they were all determined at last to yield the fishery point, I thought they were wrong not to give it up now and sign the treaty without another reference to England, as well as without my signature. I could not sign it, because I could not consent to give up that point. But if I were of their opinion, I would make sure of the treaty now. They were setting everything afloat by another reference, and it was arrant trifling to be still cavilling about a point upon which they had resolved ultimately to yield."

The following is an extract from Mr. Adams' Memoirs under date 25th December, 1814, relating to the settling of the form of the report of the plenipotentiaries to their Secretary of State:—

"In mentioning to the Secretary of State the principle on which we had relied respecting the fisheries, I had stated that we *considered* the treaty of 1783 as a permanent contract, no part of which was liable to be abrogated by the subsequent war. Mr. Clay, with the assent of Mr. Russell, had altered it to read, we *thought* it *might* be considered, and Russell afterwards had written it, we *contended* it *might* be considered. Mr. Russell made out the fair copy of the despatch to be sent. On reading it over, to compare it with the original draft and amendments, I perceived this alteration, and immediately objected to it. I insisted upon substituting the word *must* for *might*, to read, we contended the treaty of 1783 *must* be considered, etc. Mr. Russell and Mr. Bayard agreed to this amendment." (British Counter-Case, App., p. 150.)

13 Mr. Russell, at a subsequent time in a controversy with Mr. Adams, said:—

"I do not recollect, indeed, that any member of the mission, excepting Mr. Adams himself, appeared to be a very zealous believer in that doctrine." (British Counter-Case, App., p. 162.)

In reply to Mr. Russell, Mr. Adams said:—

"Mr. Russell has taken infinite pains to fasten exclusively upon me, the imputation of being the *only* asserter of this doctrine, that from the peculiar character of the treaty of 1783, and from the nature of the fishing rights and liberties, they had none of them been abrogated by the war, and needed no new stipulation to preserve them. And it is this doctrine, which in the calmness of his urbanity he styles the *dream* of a visionary.

"I certainly never should have claimed the credit of having been alone in the assertion of this principle. I should have been willing that *all* my colleagues, who united with me in asserting it in the note of 10th November, 1814, at Ghent, signed by them all, should have gone through life with the credit, and have left to posterity the reputation, of having had each an equal share in this assertion. But Mr. Russell has effectually disclaimed all his portion of it, and its conse-

quences. He has represented it as, on the part of the minority, a *PRETEXT* to *preserve the fishing privilege*, and to get rid of a proposition confirmative of the British right to the navigation of the Mississippi. He says he does not recollect that any member of the mission, except myself, appeared to be a very zealous believer in that doctrine. I thank Mr. Russell for that concession. If there was moral virtue or has been successful result in the assertion of that principle to preserve the fishing liberties, I ask no more than an equal share in the esteem of my country, for having asserted it, with those of my colleagues who are yet willing to bear the imputation, not as a *pretext*, but with sincerity of heart, and as very zealous believers in it. But were every other living member of the mission to say, and were the spirit of Bayard from the tomb to join with them and declare, that they *assumed* this principle only in the spirit of compromise, and as a *pretext*, but that they considered it only as the dream of a visionary, I would answer—the dream of the visionary was an honest dream. He believed what he affirmed and subscribed. And, I might confidently add, it has saved your fisheries. Nor should I need other proof, than the negotiations with Great Britain since the peace, and the convention of 1818.” (British Counter-Case, App., p. 163.)

If Mr. Adams’ conception met with little support from his colleagues, they are by no means the only Americans who have been unable to accept it. Such distinguished Americans as Mr. Daniel Webster, in 1852, (then United States Secretary of State), and Professor Pomeroy, in 1871, have been unable to agree with the Adams theory.

14 Mr. Webster, referring to the liberty to fish conferred on the inhabitants of the United States, states:—

“It is admitted that this is a liberty held by the inhabitants of the United States by concession and not exempted from abrogation by war.” (United States Case, App., p. 532.)

Professor Pomeroy, in an article in the “American Law Review,” (1871, vol. v. p. 389), on the North-Eastern Fisheries, speaks of the partition theory in the following terms:—

“The analogy suggested between the treaty of 1783 and a partition among co-owners of their lands and the rights issuing therefrom previously held in common, is more fanciful than sound. That treaty created and conferred a liberty, and did not merely recognize a subsisting right, to fish in the Canadian territorial waters. This must be conceded at the outset, and our further discussion will be based upon the concession.”

DISCUSSION OF UNITED STATES ARGUMENT ON PARTITION.

It will be found that the argument now presented on this point by the United States varies not inconsiderably from that relied on by Mr. Adams in 1814, and the differences illustrate the great difficulty of formulating the proposition in any tangible way. Without dwelling upon these differences in detail it is now proposed to show that

the position taken up by the United States in their Case and Counter-Case is quite untenable.

In the Case of the United States the argument is put as follows:—

“The United States and Great Britain thus met as independent nations negotiating for the purpose of concluding a treaty of peace dividing between them the British Empire in North America; and standing on this basis the Commissioners on the part of the United States asserted and insisted throughout the negotiations that the British interests in the North Atlantic coast fisheries were subject to such division and that the pre-existing right of the Colonies therein must be recognized and continued by the treaty.

“The people of the Massachusetts Bay Colony and of the other Colonies had continuously and freely resorted to these fisheries and exercised unrestricted fishing rights and liberties there until the time of the Revolution, and had borne almost unaided the burden of maintaining and defending their own and British interests in these fisheries against the aggressions of the French during the wars between Great Britain and France. In view of such continuous usage and enjoyment and by virtue of the services rendered by them in defence of these fisheries, the American Colonies asserted and insisted
15 that they had in them at least the equal rights of joint owners with Great Britain and the other British Colonies.” (United States Case, p. 8.)

The argument, as thus formulated, involves the following propositions:—

I. That the treaty of 1783 was a partition of joint property between co-owners.

II. That the effect of this partition was to exempt American fishermen from obligation to conform to such reasonable regulations for the conduct and preservation of the fisheries as then existed, or as the legislatures, within whose jurisdiction the fisheries lay, might afterwards properly deem to be necessary.

III. That the fishing liberties of the treaty of 1783 continued notwithstanding the war of 1812–14.

IV. That the new treaty of 1818 was not a grant of fishing liberties from Great Britain to the United States, but an acknowledgment by Great Britain that they had always existed.

It will be convenient to discuss these points separately.

JOINT OWNERSHIP.

I. It is asserted that the United States and Great Britain when they met in the negotiations of 1782 possessed “the equal rights of joint owners” in the British coast-fisheries and in British shores; and that such fisheries and shores were subject to division between them.

The objections to this contention have been already intimated. They are fully discussed in the British Counter-Case (pages 7 to 23), to which the Tribunal is respectfully referred. In short they are as follows:—

(a.) It is impossible that the United States could have claimed joint-ownership in the British coast-fisheries. The ownership was in the British Crown and not in the inhabitants of the various parts of His Majesty's Dominions. Moreover, if any ownership of that kind could ever have been asserted, (and His Majesty's Government are unable to imagine any grounds on which such a right could possibly be based,) it is clear that the inhabitants of the United States had debarred themselves from any claim to it. Six years before the negotiations for the treaty they had separated themselves from Great Britain and withdrawn themselves from British connection.

16 Any rights which "in common" with other British subjects the inhabitants of the American colonies enjoyed in respect of these fisheries necessarily ceased when they ceased to be British subjects. (United States Case, p. 7.)

(b.) No such claim was ever urged in 1782-3.

The United States Congress made no such claim. On the contrary, the resolutions of Congress are absolutely inconsistent with the existence of any such claim. (British Counter-Case, pp. 8-15.)

The United States negotiators made no such claim. They asked for the concession of the fisheries not as a matter of right, but on grounds which are wholly inconsistent with any claim of right. (British Counter-Case, p. 16.)

The correspondence between the peace Commissioners and their respective Governments, the journal of Dr. Franklin (one of the United States Commissioners), and the more complete diary of Mr. John Adams (another of the United States Commissioners) demonstrate, by the complete absence from them of all reference to partition, that the idea of it had not occurred to anyone engaged in the negotiations. (British Counter-Case, App., pp. 28-116.)

(c.) The general form of the treaty and of the preliminary articles is absolutely inconsistent with any idea of joint ownership. In form, they constitute a relinquishment by the King of England of his claim to the territory of the thirteen States. And they are framed on the obvious assumption that his sovereignty over the remaining British possessions in America remains unaffected by the war or by the treaty. (British Counter-Case, pp. 19-20.)

(d.) The wording of the clause referring to the fishing liberties shows that they were a grant from Great Britain, and not a mere acknowledgment of property already belonging to the United States.

The distinction between the words used in the treaty which relate to the sea-fisheries, and those which relate to the shore fisheries and

the soil, is consistent only with the idea that the fishing liberties on the shore and the soil were a new grant. As to the sea-fisheries, the words are that the people of the United States "shall continue to enjoy," whereas the words relating to the shore fisheries and the soil are that "the Inhabitants of the United States shall have liberty," &c.

More cogent still is the distinction between the words "right" and "liberty." The word "right" is applied to the sea-fish-
 17 eries and the word "liberty" to the shore-fisheries. The history of the negotiations shows that this distinction was advisedly adopted. The observations made by Mr. Daniel Webster in his unfinished Memorandum of 1852, which is printed in the United States Case Appendix at p. 526, and extracts from which will be found in the British Counter-Case, at p. 22, illustrate clearly the distinction between "right" and "liberty" which is here being pointed out.

(e.) A further difficulty if the matter is to be examined analytically, lies in the fact that the thirteen colonies in 1782-3 constituted not one sovereignty, but thirteen. The Confederation was constituted in 1778, but it took nothing in the way of property or assets from the confederating States. It follows that if partition was made between joint-owners in 1782-3, it was not between Great Britain and the United States, but between Great Britain and the thirteen States.

(f.) The attitude of the United States towards the French fishing rights in Newfoundland is evidence, if further evidence be needed, that no idea of joint property or partition existed in 1783.

By the preliminary Articles of Peace between Great Britain and the United States which were signed on the 30th November, 1782, the fishery liberties were defined in the form finally adopted in the treaty of the 3rd September, 1783.

By the treaty of peace with France, which was signed on the same day, Great Britain granted to France the right of fishing on the coast between Point Riche and Cape Ray, a right which she had not enjoyed under the Treaty of Utrecht. The United States were no party to this treaty, and never in any way protested against the dealing by Great Britain, in this way, with fisheries which are now alleged to have formed the joint property of Great Britain and the United States. Nor did they protest against the subsequent treaties by which the rights on the French treaty shores were renewed after each war between France and Great Britain.

Moreover, the United States acquiesced and indeed maintained as against France that the sovereignty of Great Britain on the French treaty coasts was unimpaired by the treaty of 1783, and in 1822-24 maintained Great Britain's sovereignty upon the "French

18 shore " most vigorously as against the French. United States vessels having assumed a right to fish upon them, French cruisers intervened, and thereupon a protracted diplomatic correspondence ensued. Failing to convince the French Government, the United States turned to Great Britain, requesting it to assert its sovereignty over the *locus in quo*. The following extracts will show the position assumed by the United States. In a letter from Mr. Rush (United States Minister at London) to Mr. Gallatin (United States Minister at Paris) of the 10th October, 1822, Mr. Rush quoted from a report of a Committee:—

"The committee are decidedly of opinion, that by the words of the treaty," (of 1783, between the United Kingdom and France) "your Majesty continues to be sole Sovereign of the Island of Newfoundland." (British Case, App., p. 102.)

And Mr. Rush added:—

"This is our argument. It is that upon which foreign nations will stand, and we in particular, under our convention with England of 1818."

The same position was assumed by the United States towards France. In a long letter to Viscount Chateaubriand (14th March, 1823), Mr. Gallatin argued against the exclusive character of the French claim, and added:—

"Whatever may be the extent of the rights of France on that coast, whether exclusive or not, they are only those of taking and drying fish. The sovereignty of the Island of Newfoundland, of which she had till then possession, was expressly ceded by the treaty of Utrecht to Great Britain, subject to no other reservation whatever but that of fishing as above mentioned, on part of the coast. The jurisdiction and all the other rights of sovereignty remained with and belonged to Great Britain and not to France. She has not therefore that of doing herself on that coast, what may be termed summary justice, by seizing or driving away vessels of another nation, even if these should in her opinion infringe her rights. Such acts of authority which may be lawful when performed within the acknowledged jurisdiction, become acts of aggression when committed either on the high seas or anywhere else without the jurisdiction of the Power that permits them." (British Case, App., p. 105.)

In a letter from Mr. John Quincy Adams, as United States Secretary of State, to Mr. Rush (United States Minister at London), Mr. Adams said:—

19 "Two distinct questions arose from these incidents: one, upon the pretension of France to the *exclusive* right of fishing on that part of the coast of Newfoundland; and the other, upon the right of French armed vessels to order away vessels of the United States from places within the exclusive jurisdiction of Great Britain." (British Case, App., p. 107.)

Mr. Adams thought that the course of events had removed—

“all scruple of delicacy with regard to the propriety of stating the case of the British Government, and calling upon them to maintain at once the faith of their treaty with us and the efficacy of their own territorial jurisdiction, violated by the exercise of force against the fishing vessels of the United States engaged in their lawful occupations under its protection.

“ The question concerning the jurisdiction belongs peculiarly to her. We respect the territorial jurisdiction of Great Britain in restoring to her for the effectual exercise of it to carry into execution her engagements with us. But if, on discussion of the subject between them, France should not explicitly desist from both the pretensions to the exclusive fishery and to the exercise of force within British waters to secure it you will claim that which the British Government cannot fail to perceive is due, the unmolested execution of the treaty stipulation contained in the convention of October 20, 1818; and if the British Government admits the claim of France to *exclusive* fishery on the western coast of Newfoundland from Cape Ray to the Quirpon Islands, they will necessarily see the obligation of indemnifying the United States by an equivalent for the loss of that portion of the fishery, expressly conceded to them by the convention, which, in the supposed hypothesis, must have been granted by Great Britain under an erroneous impression that it was yet in her power to grant.”

In his diary under date 8th July, 1823, Mr. Adams gives the following account of his conversation with the Comte de Menou:—

“I told him the whole affair was a question between France and Great Britain, with which we had but a secondary concern. Great Britain was bound to maintain her own jurisdiction. And if she had conceded to us a right which she had already granted as an exclusive possession to France, she must indemnify us for it.” (British Case, App., p. 108.)

These quotations show not only that the idea of suggesting the existence of qualifications of British sovereignty is of later date than 1823, but also that the position assumed by Mr. John Quincy Adams is quite inconsistent with that now assumed by the United States.

In pursuance of Mr. Adams' instructions Mr. Rush handed to a representative of the British Government a memorandum in which he said—

20 “It is obvious that if Great Britain cannot make good the title which the United States hold under her to *take* fish on the western coast of Newfoundland, it will rest with her to indemnify them for the loss.” (British Case, App., p. 110.)

All this is, of course, quite inconsistent with the theory that the United States took its fishing liberties by way of partition between joint-owners. Had that been the case and had the title of these joint-owners been found to be defective, the result would not have

been indemnity from Great Britain to the United States or indemnity from the United States to Great Britain, but merely mutual loss.

It is to be remembered that Mr. Rush was one of the negotiators of the treaty of 1818, which is said to have been, not a grant of liberties by Great Britain to the United States, but a mere acknowledgment of rights which had always theretofore existed. But in 1824, Mr. Rush speaks of Great Britain making "good the title which the United States holds under her" and if that cannot be done he asks for indemnity.

For these reasons it is submitted that the argument of the United States based on an assumed partition must fail.

EXEMPTION FROM BRITISH REGULATIONS.

II. Even if the treaty of 1783 had been, in any sense or form, a partition of the fisheries, (which His Majesty's Government has already submitted is impossible either in law or in fact,) still it does not follow that American citizens, exercising the treaty liberties in British waters, would be free from the fishery regulations in force from time to time there. The sovereignty over the shores and waters affected by these liberties is in Great Britain. That has never been challenged. The United States have never claimed any sort of jurisdiction there.

If, therefore, American fishermen were not to be subject to British regulations the position would be an impracticable one. The fishermen would be exempt from British control, but there would be no other means of control available. The United States might, if they so pleased, consent to the exercise of jurisdiction by Great Britain but, failing that consent, there would be no means of making or enforcing regulations. And this point becomes the more important when it is remembered that the exemption claimed for American fishermen would extend to the exercise of their rights on shore. His Majesty's Government submit, that the consequences which result from the construction of the United States are of themselves sufficient to show that no exemption from British regulation can ever have been contemplated.

Moreover, the contention of the United States comes to this, that by the treaty of 1783 the Colonies were maintained in the same position as before the proclamation of independence in 1776. But at that time the inhabitants of the Colonies were subject to such legislation as Great Britain might choose to enact. Their claim now is to have the same right as they had in 1783, and to have it free from the control which existed then. They claim now a larger right than they ever enjoyed at any time before their independence.

EFFECT OF WAR OF 1812.

III. His Majesty's Government contend that the privileges granted in 1783 were finally determined in 1812. In that year war broke out between the parties, and Great Britain declared that she would no longer recognise these treaty rights. During the war, American fishermen were excluded from the fisheries. And Great Britain was in exclusive possession of them at the time of the negotiations. She declared, at the first meeting, that the American fishing rights were at an end, and that declaration was repeated immediately before the signature of the treaty of peace. On the restoration of peace, she continued to enforce her exclusive possession. She made some modification in the original order of exclusion pending further negotiations, at the request of the United States, but the facts which have been set out in the British Counter-Case at pp. 23 to 26 show clearly that she exercised a control which was consistent only with the position that the treaty liberties were at a end. Great Britain contends that the treaty liberties given in 1783 were terminated by the war of 1812, and by the declaration and action of Great Britain to which reference has been made.

The United States, in their Case, have formulated the question with regard to the effect of the war of 1812 thus:—

22 “A considerable portion of his” (Lord Bathurst's) “argument is devoted to showing that the right of the United States to exercise these liberties was dependent upon the treaty, and that, therefore, they would not survive the treaty, all of which might well be admitted without affecting the question at issue, which was, not whether such rights would continue independently of the treaty, but whether or not the treaty obligations were revocable without the consent of the United States.” (United States, Case, p. 26.)

The position here assumed by the United States would appear to be that, even in case of war, the treaty obligations subsisted unless revoked with the consent of the United States. It is submitted that this proposition is quite unsustainable. His Majesty's Government do not desire to enter into the general argument as to the rules of international law with regard to the effect of war upon treaties. But at the very lowest it must be admitted that war between two Powers, parties to a treaty, gives occasion to either of these Powers to revoke the contract created by that treaty, whether the other Power consents or not. This necessarily results from the very fact of war and the hostile relations which it involves.

The concession to the inhabitants of the United States to fish cannot be compared to a cession of territory followed by possession. The liberty in the present case is one which rests on contract. It is not, and cannot be, disputed that Great Britain, after the war of 1812 had broken out, treated the rights conferred on American fisher-

men as at an end. This is indeed admitted in the United States Counter-Case at p. 80 in the following passage:—

“It will be remembered that during the period between the War of 1812 and the treaty of 1818, Great Britain denied the right of American fishermen to enter any of the bays, harbors, creeks, or inlets of the British Colonies within the three mile limit on the ground that the fisheries provisions of the treaty of 1783, under which such right was held, had been abrogated by the War of 1812.”

It inevitably follows that the treaty of 1818 must, in point of international law, be regarded as a new grant of the fisheries. Great Britain continuously asserted throughout the negotiations that the liberties under the treaty of 1783 were at an end, and the treaty of 1818 cannot be read as directed to any other state of facts.

Reference may be made to the fact that the rights with regard to fisheries conferred on France by the treaty of Utrecht were
 23 renewed after every war between the two countries. This was done by the treaties of 1763, 1783, 1802, 1814 and 1815.

LIBERTIES OF 1818 A NEW GRANT.

IV. His Majesty's Government submits that the liberties granted in 1818 were a new and distinct grant, and that an argument, based on circumstances alleged to have existed in 1783, cannot be applied to the treaty of 1818. There was clearly no partition in 1818, and the treaty of that year did not merely renew the liberties of 1783; it conceded new and different liberties, and was a new grant.

That the liberties of the 1818 treaty were not identical with those in the 1783 treaty is obvious—they were but a fraction of those larger liberties. And that all the liberties of the 1818 treaty were not included in the 1783 treaty, but that they were, to some extent, new is equally obvious.

The treaty of 1783 gave liberty to take fish (British Case, App., p. 13)—

“on such part of the Coast of Newfoundland as British Fishermen shall use,”

whereas the treaty of 1818 gave liberty to fish on certain specified parts of the Newfoundland coast without any reference to their use by British fishermen.

The treaty of 1783, in giving liberty to fish on the coast of Newfoundland, expressly said, “but not to dry or cure the same on that island;” whereas the treaty of 1818 gave liberty to dry and cure fish on part of the southern coast of that island.

As to these new grants, it is plainly impossible for the United States to contend that the treaty of 1818 was an acknowledgment

of rights which had always existed. And if so, the whole argument falls to the ground.

It is impossible, moreover, to contend that the treaty of 1818 was an acknowledgment of any prior rights of the United States; unless, indeed, the undisputed facts are altogether ignored. The claim for some such acknowledgment had been expressly made by the United States, and expressly refused by Great Britain. It is impossible to hold one party to a contract bound by a construction which it had expressly repudiated before entering into that contract. On this point the following facts are material:—

24 Both at the outset, and immediately before the close of the negotiations at Ghent in 1814, the British Commissioners took the position which Great Britain ever afterwards maintained, giving formal notice to the United States Commissioners—

“that the British Government did not intend to grant to the United States gratuitously the privileges formerly granted by treaty to them of fishing within the limits of the British sovereignty, and of using the shores of the British territories for purposes connected with the fisheries.” (United States Case, App., 242.)

The United States Commissioners declined to admit that the treaty privileges of 1783 had been terminated by the war, and peace was concluded without any agreement on the question.

In 1815, Mr. John Quincy Adams renewed the negotiations with Lord Bathurst in London. In a long letter, Mr. Adams, while he argued for the continued existence of the liberties of the 1783 treaty, also put forward the following reasons for concession:—

“In the interview with which your Lordship recently favoured me, I suggested several other considerations, with the hope of convincing your Lordship that, independent of the question of rigorous right, it would conduce to the substantial interests of Great Britain herself, as well as to the observance of those principles of benevolence and humanity which it is the highest glory of a great and powerful nation to respect, to leave to the American fishermen the participation of those benefits which the bounty of nature has thus spread before them; which are so necessary to their comfort and subsistence; which they have constantly enjoyed hitherto; and which, far from operating as an injury to Great Britain, had the ultimate result of pouring into her lap a great portion of the profits of their hardy and laborious industry; that these fisheries afforded the means of subsistence to a numerous class of people in the United States, whose habit of life had been fashioned to no other occupation, and whose fortunes had allotted them no other possession; that to another, and, perhaps, equally numerous class of our citizens, they afforded the means of remittance and payment for the productions of British industry and ingenuity, imported from the manufactures of this United Kingdom; that, by the common and received usages among civilised nations, fishermen were among those classes of human society whose occupations, contributing to the general benefit and welfare of the species,

were entitled to a more than ordinary share of protection; that it was usual to spare and exempt them even from the most exasperated
 25 conflicts of national hostility; that this nation had, for ages, permitted the fishermen of another country to frequent and fish upon the coasts of this island, without interrupting them, even in times of ordinary war; that the resort of American fishermen to the barren, uninhabited, and, for the great part, uninhabitable rocks on the coasts of Nova Scotia, the Gulf of St. Lawrence, and Labrador, to use them occasionally for the only purposes of utility of which they are susceptible, if it must, in its nature, subject British fishermen on the same coasts to the partial inconvenience of a fair competition, yet produces, in its result, advantages to other British interests equally entitled to the regard and fostering care of their Sovereign. By attributing to motives derived from such sources as these the recognition of these liberties by His Majesty's Government in the treaty of 1783, it would be traced to an origin certainly more conformable to the fact, and surely more honourable to Great Britain, than by ascribing it to the improvident grant of an unrequited privilege, or to a concession extorted from the humiliating compliance of necessity." (British Case, App., p. 68.)

In reply, Lord Bathurst said:—

"His Majesty's Government have not failed to give to the argument contained in the letter of the 25th ultimo a candid and deliberate consideration; and, although they are compelled to resist the claim of the United States, when thus brought forward as a question of right, they feel every disposition to afford to the citizens of those States all the liberties and privileges connected with the fisheries which can consist with the just rights and interests of Great Britain, and secure His Majesty's subjects from those undue molestations in their fisheries which they have formerly experienced from citizens of the United States. (British Case, App., p. 69.)

* * * * *

"But, though Great Britain can never admit the claim of the United States to enjoy those liberties, with respect to the fisheries, as matter of right, she is by no means insensible to some of those considerations with which the letter of the American Minister concludes.

"Although His Majesty's Government cannot admit that the claim of the American fishermen to fish within British jurisdiction, and to use the British territory for purposes connected with their fishery, is analogous to the indulgence which has been granted to enemy's subjects engaged in fishing on the high seas, for the purpose of conveying fresh fish to market, yet they do feel that the enjoyment of the liberties, formerly used by the inhabitants of the United States, may be very conducive to their national and individual prosperity, though they should be placed under some modifications; and this feeling operates most forcibly in favour of concession." (British Case, App., p. 71.)

No arrangement was at that time made, and the next negotiations took place at Washington between Mr. Bagot (British
 26 Minister to the United States) and Mr. Monroe (United States Secretary of State). The basis of this negotiation is sufficiently

shown by the following extract from a letter addressed by Mr. Bagot to Mr. Monroe (27th November, 1816) :—

“ It will be in your recollection that, early in the month of July last, I had the honour to acquaint you that I had received instructions from my Government to assure you that, although it had been felt necessary to resist the claim which had been advanced by Mr. Adams, the determination had not been taken in any unfriendly feeling towards America, or with any illiberal wish to deprive her subjects of adequate means of engaging in the fisheries; but that, on the contrary, many of the considerations which had been urged by Mr. Adams, on behalf of the American citizens formerly engaged in this occupation, had operated so forcibly in favour of granting to them such a concession as might be consistent with the just rights and interests of Great Britain, that I had been furnished with full powers from His Royal Highness the Prince Regent to conclude an arrangement upon the subject, which it was hoped might at once offer to the United States a pledge of His Royal Highness's goodwill, and afford to them a reasonable participation of those benefits of which they had formerly the enjoyment.” (British Case, App., p. 77.)

These negotiations also failed to produce agreement. They were reopened in London in 1818, and resulted in the treaty of that year. The instructions to the British Commissioners (24th August, 1818) contained the following:—

“ The accompanying papers will bring the present state of the fishery question under your view. I refer you to the proceedings at Ghent for those arguments upon which the British plenipotentiaries maintained, as I conceive unanswerably, that the second branch of the 3rd Article of the treaty of 1783 had expired with the war. The negative of this proposition was certainly contended, but very feebly, by the American plenipotentiaries, which is proved almost to the extent of an admission of the principles contended for on the part of this Government by their tendering an article in which the same privileges were, by a fresh stipulation, to be again secured to the subjects of the United States upon an equivalent offered on their part.” (British Case, App., p. 85.)

During the negotiations the United States Commissioners presented a draft of a proposed article in which the operative words were that the inhabitants of the United States should “ continue to enjoy ” the liberty, &c., and they accompanied it with the following “ Explanatory Memorandum ” :—

“ The American plenipotentiaries presented for consideration an article on the subject of certain fisheries. They stated, at the same time, that as the United States considered the liberty of taking, drying, and curing fish, secured to them by the treaty of peace of 1783, as being unimpaired, and still in full force for the whole extent of the fisheries in question, whilst Great Britain considered that liberty as having been abrogated by war; and as, by the article now proposed, the United States offered to desist from their claim to a cer-

tain portion of the said fisheries, that offer was made with the understanding that the article now proposed, or any other on the same subject which might be agreed on, should be considered as permanent, and, like one for fixing boundaries between the territories of the two parties, not to be abrogated by the mere fact of a war between them; or that, if vacated by any event whatever, the rights of both parties should revive and be in full force, as if such an article had not been agreed to." (British Case, App., p. 88.)

The difference of opinion referred to was fully debated between the Commissioners, but, as appears from the separate report of Mr. Gallatin (one of the United States Commissioners) the British Commissioners adhered firmly to their view. He said:—

"I became perfectly satisfied that no reliance could be placed on legal remedies; that no court in England would give to the treaty of 1783 a construction different from that adopted by their Government, and that if an Act of Parliament was wanted, it would be obtained in a week's time and without opposition." (British Case, App., p. 97.)

If, then, it be said that the new treaty was intended to be an acknowledgment of the existence of previous liberties, the replies are:—

1. The old liberties were not all renewed.
2. Some new liberties were created.

3. The United States negotiators of the treaty proposed that the language of the new treaty should be—

"the inhabitants of the said United States shall continue to enjoy unmolested, for ever, the liberty to take fish," &c. (British Case, App., p. 88.)

The British Commissioners declined to permit the use of the language. And the treaty is couched in terms which point to a fresh concession only:—

"It is agreed between the high contracting parties that the inhabitants of the said United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish," &c. (British Case, App., p. 30.)

28 Recognition of the existence of liberties of any sort, therefore, was steadily refused by the British Government from the opening of the negotiations at Ghent in 1814; throughout the Adams-Bathurst negotiations in 1815; throughout the Bagot-Monroe negotiations in Washington in 1816; throughout the negotiations of the treaty itself; and, by the treaty, the United States took, not that which they would have obtained upon the basis of a recognition of rights, but that which the British Government was willing to concede. It cannot therefore be said that the treaty was intended to be a recognition of existing rights.

DIFFERENCE BETWEEN REGULATIONS PRIOR AND SUBSEQUENT TO TREATY.

There are a few other points referred to in the Case and Counter-Case of the United States on which it may be convenient to submit some observations at the present stage.

It is suggested that there is a distinction between regulations existing prior to 1818 and those made subsequently, and that American fishermen are not subject to any regulations not in existence at the date of the treaty. But it is submitted that it is quite impossible to make any sound distinction of this kind.

There is nothing specifically in the treaty relating either to the one set of laws or the other. And the true question is, not whether the grant in the treaty authorises the regulation of the conduct of foreigners when they come within the treaty territory, but whether, besides the grant of liberty to fish, there is also a grant of freedom from all restraint, however reasonable—whether the grant is, not one of liberty to fish in a reasonable way, but a grant of unlicensed liberty so to act as to destroy the fisheries to the prejudice of other persons who have equal rights.

As the conditions of the fishery changed, it must have been intended that there should be power to frame suitable regulations. The regulations existing in 1818 might be quite inapplicable to the state of things existing fifty years afterwards. Can it be suggested that old regulations applicable to cod fishing were to be obligatory on American fishermen, and that new regulations necessitated by new conditions, for instance the mackerel fishing, could not be made?

29

JOINT REGULATIONS.

The United States Case calls attention to the various occasions upon which the British Government invited the co-operation of the United States in framing regulations for the coast-fisheries. The fact that the British Government has been willing to consult with the United States upon a subject which is of great moment to the inhabitants of both countries, cannot, it is submitted, be fairly used as casting any doubt on those sovereign rights which Great Britain has never waived and has, whenever occasion arose, expressly asserted. The subject is dealt with in the British Counter-Case at pages 33 to 36.

FRENCH FISHING RIGHTS.

In the Counter-Case of the United States an elaborate argument has been presented based on an analogy alleged to exist between the rights given to the inhabitants of the United States under the treaty

of 1818 and those which have been enjoyed by French fishermen under the various treaties between France and Great Britain. But when the facts are examined it will be seen that there is no analogy between the two cases.

By the treaty of Utrecht (1783) France surrendered the claim, which she had insisted on up to that time, to the sovereignty of the Island of Newfoundland. But she retained for her subjects—

1. The right to erect stages made of boards and huts necessary and usual for drying fish, and

2. The right to catch fish on a certain specified portion of the Newfoundland coast. (British Case, App., p. 7.)

By the treaty between Great Britain and France of 1783, one portion of coast over which the fishing privileges which had been acquired under the treaty of Utrecht was given up and another portion substituted. The material provisions were in the following terms (British Case, App., p. 11) :—

“ V. His Majesty the Most Christian King, in order to prevent the quarrels which have hitherto arisen between the two nations of England and France, consents to renounce the right of fishing, which belongs to him in virtue of the aforesaid article of the treaty of Utrecht from Cape Bonavista to Cape St. John, situated on the eastern coast of Newfoundland, in fifty degrees north latitude; and

30 His Majesty the King of Great Britain consents on his part that the fishery assigned to the subjects of His Most Christian Majesty, beginning at the said Cape St. John, passing to the north, and descending by the western coast of the Island of Newfoundland, shall extend to the place called Cape Raye, situated in forty-seven degrees, fifty minutes latitude. The French fishermen shall enjoy the fishery which is assigned to them by the present article, as they had the right to enjoy that which was assigned to them by the treaty of Utrecht.”

Mutual declarations accompanied this treaty. That of the King of England contained the following :—

“ To this end, and in order that the fishermen of the two nations may not give cause for daily quarrels, His Britannic Majesty will take the most positive measures for preventing his subjects from interrupting in any manner, by their competition, the fishery of the French, during the temporary exercise of it which is granted to them upon the coasts of the Island of Newfoundland; and he will, for this purpose, cause the fixed settlements, which shall be formed there, to be removed. His Britannic Majesty will give orders, that the French fishermen be not incommoded, in cutting the wood necessary for the repair of their scaffolds, huts, and fishing vessels.

“ The thirteenth article of the treaty of Utrecht, and the method of carrying on the fishery which has at all times been acknowledged, shall be the plan upon which the fishery shall be carried on there; it shall not be deviated from by either party; the French fishermen

building only their scaffolds, confining themselves to the repair of their fishing vessels, and not wintering there; the subjects of His Britannic Majesty, on their part, not molesting, in any manner, the French fishermen, during their fishing, nor injuring their scaffolds during their absence." (British Case, App., p. 11.)

The statute passed subsequently to this treaty (28 Geo. III, c. 35) provided that—

"it shall and may be lawful for His Majesty, his heirs and successors, by advice of council, from time to time, to give such orders and instructions to the governor of *Newfoundland*, or to any officer or officers on that station, as he or they shall deem proper and necessary to fulfil the purposes of the definitive treaty and declaration aforesaid; and, if it shall be necessary to that end, to give orders and instructions to the governor, or other officer or officers aforesaid, to remove, or cause to be removed, any stages, flakes, train vatts, or other works whatever, for the purpose of carrying on fishery, erected by His Majesty's subjects on that part of the coast of *Newfoundland* which lies between *Cape Saint John*, passing to the north, and descending by the western coast of the said island to the place called *Cape Raye*, and also
31 all ships, vessels, and boats, belonging to His Majesty's subjects, which shall be found within the limits aforesaid, and also, in case of refusal to depart from within the limits aforesaid, to compel any of His Majesty's subjects to depart from thence; any law, usage, or custom, to the contrary notwithstanding." (British Case, App., p. 562.)

It will be seen from these extracts that the right of the French fishermen was not a right in common with British subjects, such as American fishermen have. It was a right of fishing which was not to be interrupted by British subjects by their competition, during the period when it was being exercised by the French.

But the difference does not lie in the mere terms of the grant alone. From the very first France claimed that the rights given to her were exclusive. Great Britain never admitted that claim, but she was never able to induce France to forgo it. The United States also took objection to the French claim of an exclusive right, and the correspondence on the point in 1822 has already been referred to. It is printed in the Appendix to the British Case. (British Case, App., pp. 101-113.) France met the objection of the United States by pointing out that by Article 10 of the treaty, concluded between the two countries in 1778, the United States had pledged themselves never to disturb the subjects of the Most Christian King in the exercise of the perpetual and exclusive enjoyment which belonged to them on the part of the coasts of the island designated in the treaty of Utrecht.

The United States never did claim, and never could have claimed, any exclusive right, and there is therefore no parallel between the two treaties.

Another difference between the two cases arises from the fact that the French claimed that the rights on the French coast were the survival of a portion of the sovereignty which France had previously exercised in Newfoundland. This claim was always contested by Great Britain. No such claim to sovereignty has ever been put forward by the United States in respect of the fisheries now in question.

It is submitted, that this again renders it quite impossible to argue from the fact that the British Government did not frame regulations affecting French fishermen, that there is no right to make regulations which would affect American fishermen equally with British subjects. There was a great deal of friction between Great
32 Britain and France with regard to the French treaty rights, and the fact that no regulations were made which might have increased that friction cannot, it is submitted, lend any colour to the contention of the United States that their fishermen are to be exempt from regulation in the enjoyment of rights under a treaty which is couched in different terms, and was entered into under totally different circumstances. French subjects had exercised these rights of fishing before the treaty of Utrecht, and never owed any allegiance to Great Britain. Any enjoyment by the fishermen of the Colonies of these fisheries before 1783 had been merely because they were at the time subjects of the British crown.

The dispute with France has now happily been ended by the treaty of 1904, by which France abandoned her claim to any exclusive right, but retained a right to fish on a footing of equality with British subjects on the coast between Cape St. John and Cape Ray. By virtue of this treaty the French position became for the first time analagous to that of the United States under the treaty of 1818, and by article 2 France agreed that—

“On the above-mentioned portion of the coast, British subjects and French citizens shall be subject alike to the laws and Regulations now in force, or which may hereafter be passed for the establishment of a close time in regard to any particular kind of fish, or for the improvement of the fisheries. Notice of any fresh laws or Regulations shall be given to the Government of the French Republic three months before they come into operation.” (United States, Case, App., p. 85.)

British laws therefore now regulate the fishing by French fishermen.

The United States Counter-Case does not call attention to this clause, but it cites the one which follows:—

“The policing of the fishing on the above-mentioned portion of the coast, and for prevention of illicit liquor traffic and smuggling of spirits, shall form the subject of Regulations drawn up in agreement by the two Governments.”

This clause has no application to such fishery regulations as are now being dealt with.

In the Counter-Case of the United States reliance is placed upon an alleged correspondence between the British statutes passed with reference to the two treaties—the treaty between Great Britain and France and that between Great Britain and the United States. It says—

“It is of peculiar significance, therefore, that the legislation adopted by Great Britain in 1819 for the purpose of carrying out its obligations to American fishermen under the treaty of 1818 should in effect correspond exactly to the legislation adopted by Great Britain in 1788 for the purpose of carrying out its obligations to the French fishermen under its treaty of 1783, (which will be found to be the case upon a comparison of the provisions of the Act of 1788 and the Act of 1819, which has already been examined); and that, as has already been shown, the regulations adopted by Great Britain under the Act of 1819, in relation to the liberty of the American fishermen to take fish on the treaty coasts under the treaty of 1818, were directed not against American fishermen, but against British subjects, and required them ‘not to interrupt in any manner the aforesaid fishery’ carried on by the inhabitants of the United States on their treaty coasts. (United States Counter-Case, p. 18.)

“It is, therefore, evident that at the time the treaty of 1818 was made, Great Britain claimed no more authority to impose fishing regulations upon the American fishermen under that treaty than upon the French fishermen under their treaty of 1783; and that by adopting these acts of Parliament for the purpose of carrying out the British obligations under respectively the French treaty of 1783 and the American treaty of 1818, and by the course pursued by Great Britain in giving these treaties effect, the British Government gave notice to all concerned that in both cases alike the controlling obligation imposed upon Great Britain by these treaties was non-interference with the French and American fishermen in the exercise of their liberty of fishing on their respective treaty coasts.”

But the only correspondence between the statutes is that both were passed for the purpose of giving effect to fishing treaties. Each was suited to its own circumstances. And it is in their marked contrast, and not in their similarity, that significance lies. The statute relating to the French treaty (28 Geo. III, c. 35) is entitled—

“An Act to enable His Majesty to make such Regulations as may be necessary to prevent the inconvenience which might arise from the competition of His Majesty’s subjects and those of the Most Christian King, in carrying on the Fishery on the Coasts of the Island of *Newfoundland*.” (British Case, App., p. 562.)

The enacting part of the act is in express terms confined to the prevention of British subjects from interrupting the French fishery by competition in accordance with the declaration of 1783.

34 And for this purpose it enabled His Majesty to give orders for the removal of British apparatus on the shore and of British

ships. On the other hand, the statute relating to the United States treaty (59 Geo. III, c. 38) is entitled—

“An Act to enable His Majesty to make Regulations with respect to the taking and curing Fish on certain parts of the Coasts of *Newfoundland*, *Labrador*, and His Majesty’s other Possessions in *North America* according to a Convention made between His Majesty and the United States of *America*.” (British Case, App., p. 656.)

It expressly authorised His Majesty (British Case, App., p. 565)—

“to make such regulations, and to give such directions, orders and instructions to the Governor of *Newfoundland*, or to any officer or officers on that station, or to any other person or persons whomsoever, as shall or may be from time to time deemed proper and necessary for the carrying into effect the purposes of the said convention, with relation to the taking, drying and curing of fish by inhabitants of the United States of *America*, in common with *British* subjects, within the limits set forth in the said article of the said convention, and hereinbefore recited;”

In conclusion, His Majesty’s Government desires to point out that the argument raised by the United States on this supposed analogy with the rights granted to France has never before been raised in the discussions between the two nations. It is put forward for the first time in the Counter-Case of the United States Government. If the Tribunal should desire to investigate the history of the long controversy between Great Britain and France on this point, His Majesty’s Government will ask leave to submit the necessary evidence.

SUMMARY OF MATERIAL EVENTS AND DISCUSSIONS.

The construction placed on the treaty by the conduct of the two parties to it supports the view which Great Britain has always maintained. The particular facts have been set out at pp. 24 to 40 of the British Case, to which the Tribunal is respectfully referred. The principal points that emerge from the statement of facts there presented are as follows:—

1. In 1855 Mr. Marcy, the United States Secretary of State, issued a circular enjoining American fishermen to observe Colonial regulations. It was in the following terms (British Case, p. 26):—

35 “It is understood that there are certain Acts of the British North American Colonial Legislatures, and also, perhaps, Executive Regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the Colonies and injuries to the fishing thereon. There is nothing in the Reciprocity Treaty between the United States and Great Britain which stipulates for the observance of these regulations by our fishermen; yet, as it is presumed, they have been framed with a view to prevent injuries to the fisheries, in which our fishermen now have an equal interest with those of Great Britain, it is deemed reasonable and

desirable that both should pay a like respect to those regulations, which were designed to preserve and increase the productiveness and prosperity of the fisheries themselves. It is, consequently, earnestly recommended to our citizens to direct their proceedings accordingly. You will make this recommendation known to the masters of such fishing vessels as belong to your port, in such manner as you may deem most advisable.

"I am, &c.,
(British Case, App., p. 207.)

"W. L. MARCY."

Extracts from a statute of New Brunswick (Revised Statutes of New Brunswick, Vol. I, title 22, cap. 101) were appended.

His Majesty's Government took exception to this statement, and the British Minister at Washington made official representations on the matter. The view which he pressed on behalf of the British Government is stated by him in his letter to the Earl of Clarendon of the 7th August, 1855, in the following passage:—

"It appears to me that American citizens, while within British jurisdiction would be subject to the penalties attached to the infringement of all legal regulations, local, as well as general, by which British subjects are bound:—and not less to those affecting the fisheries, provided always, that these latter did not trench upon the rights secured by treaty to citizens of the United States. Did any such law or police regulation exist, or were any such to be enacted, the Government of the United States would no doubt be justified in demanding its abrogation;—but the principle now enounced by Mr. Marcy extends much further, for it goes to exonerate American citizens from the penalties attaching to the violation of all British laws and regulations, however unobjectionable, now affecting, or which may hereafter affect, the British fisheries; and leave their observance to depend solely on the good feeling or good sense of the individuals who may at any time happen to be engaged in those fisheries." (British Case, App., p. 208.)

This view met with the express approval of His Majesty's
36 Government. The Earl of Clarendon, the Secretary of State for Foreign Affairs, said in reply (11th October, 1855):—

"By the Reciprocity Treaty between this country and the United States American citizens are admitted to the benefit of certain fisheries carried on in British waters in common with Her Majesty's subjects. It follows as a necessary consequence that such American citizens are bound to observe the existing laws and regulations established for the conduct of such fisheries by which British subjects are bound. This is necessarily implied in the very words of the Article of the Treaty, but independently of all agreement, it would follow, on general principles, that American fishermen pursuing their occupation within British territory would be bound to observe the local laws and regulations in like manner as all foreigners are bound to observe the municipal laws of the country in which they are resident.

"It is indeed literally true, as Mr. Marcy states, that there is no *express* stipulation in the Reciprocity Treaty which binds American citizens to observe the British Colonial Regulations, but the obligation to do so did *not require a stipulation*; it attaches upon American citizens as soon as they claim the benefit of the Treaty." (British Case, App., p. 208.)

In consequence of these representations a new circular was issued by the United States containing the following passage:—

"It is deemed reasonable and desirable that both United States and British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on those coasts. Such being the object of these laws and regulations, the observance of them is enjoined upon the citizens of the United States in like manner as they are observed by British subjects. By granting the mutual use of the inshore fisheries neither party has yielded its right to civil jurisdiction over a marine league along its coast. Its laws are as obligatory upon the citizens or subjects of the other as upon its own. The laws of the British Provinces not in conflict with the provisions of the Reciprocity Treaty would be as binding upon citizens of the United States within that jurisdiction as upon British subjects. Should they be so framed or executed as to make any discrimination in favour of the British fisherman, or to impair the rights secured to American fishermen by that Treaty, those injuriously affected by them will appeal to this Government for redress." (British Case, App., p. 209.)

It is clear from this incident that in 1856 the United States admitted the British contention after it had been expressly brought to their notice and discussed. The grant of fishing liberties in the reciprocity treaty of 1854 is in terms the same as that in the treaty of 1818.

37 2. In 1866 the reciprocity treaty was terminated by the United States, and Mr. Cardwell, the British Colonial Secretary, stated the position of His Majesty's Government on the question of regulations under the treaty of 1818 in a letter of the 12th April, 1866, to the Lords of the Admiralty. This letter formed the basis of instructions subsequently issued to British Naval Officers. It was in the following terms:—

"On the other hand, naval officers should be aware that Americans who exercise their right of fishing in Colonial waters in common with subjects of Her Majesty, are also bound, in common with those subjects, to obey the law of the country, including such Colonial laws as have been passed to ensure the peaceable and profitable enjoyment of the fisheries by all persons entitled thereto.

"The enforcement of the Colonial laws must be left as far as the exercise of rights on shore is concerned, to the Colonial authorities, by whom Her Majesty's Government desire they shall be enforced with great forbearance especially during the present season. In all cases they must be enforced with much forbearance and consideration, and they must not be enforced at all by Imperial officers if they

appear calculated to place the Americans at a disadvantage in comparison with British fishermen in the waters which, by the Treaty of 1818, are opened to vessels of the United States. On the contrary, their unequal operation should, in this case, be reported to their Lordships, a copy of the Report being at the same time sent to the Governor of the Colony." (British Case, App., p. 221.)

No exception was taken by the Government of the United States to this letter. It was brought to their attention in 1870. (British Case, App., p. 237.)

3. In 1870 and again in 1872, Mr. Boutwell, the United States Secretary to the Treasury, issued a circular to American fishermen in which the British contention was again admitted. He said:—

"Fishermen of the United States are bound to respect the British laws and regulations for the regulation and preservation of the fisheries to the same extent to which they are applicable to British or Canadian fishermen." (British Case, App., p. 237.)

In the Counter-Case of the United States an endeavour is made to show that this circular was confined to the non-treaty coasts. There is no such limitation in the circular itself. Indeed, the passage refers in express terms to a part of the treaty coasts. (United States Counter-Case, p. 37.)

38 4. In 1873 some discussion arose in regard to a proviso proposed to be inserted in the Act of the Newfoundland Legislature, which was enacted to give effect to the treaty of Washington. The proviso has been set out in the British Case (British Case, pp. 30, 31), and it will be seen for the reasons there pointed out that it was unnecessary. The United States protested against it, and it was not insisted upon.

Much stress is laid on this point in the Counter-Case of the United States (United States Counter-Case, pp. 32–36), but it is clear that Mr. Fish, although he objected to the form of the Newfoundland statute, did not intend to question the jurisdiction of British legislatures. This is sufficiently shown in the despatches from the British Minister at Washington (Sir E. Thornton) to Lord Granville, in which he tells of his conversations with Mr. Fish. In his letter of the 23rd June, 1873, Sir E. Thornton stated that Mr. Fish said in general terms that (British Case, App., p. 251)—

"the fishermen of the two countries would have to observe the laws enacted by the country within whose jurisdiction they might be fishing."

As stated in the letter of the 30th June, 1873, Mr. Fish said that (British Case, App., p. 253)—

"The jurisdiction gave the right of laying down reasonable police regulations, and that as a matter of course such regulations would be observed by all who fished in the waters in question;"

And as stated in the letter of the 10th July, 1873 (British Case, App., p. 253), Mr. Fish said that—

“as the United States authorities would expect British fishermen, in American waters, to observe the police regulations with regard to the fisheries, so the Government of the United States would make no objection to similar regulations being enforced against American fishermen in British waters;”

5. In 1878 occurred the dispute as to the rights of American fishermen in Fortune Bay. There was a discussion as to the right of His Majesty's Government to regulate fishing by American fishermen on the coasts which had been thrown open to them by the treaty of 1871, but no definite result was obtained. Great Britain admitted that the Newfoundland fishermen were wrong in taking the law into their own hands, and paid compensation for that reason, while expressly reserving her position on the general question of the right to regulate.

39 The correspondence between Mr. Evarts and Lord Salisbury has been set out at length in the British Case (p. 31 *et seq.*).

Lord Granville, who succeeded Lord Salisbury as Foreign Secretary, in his despatch of the 27th October, 1870, to Mr. Lowell, stated clearly the British position (British Case, App., p. 289) :—

“In the first place, I desire that there should be no possibility of misconception as to the views entertained by Her Majesty's Government respecting the conduct of the Newfoundland fishermen in violently interfering with the United States' fishermen, and destroying or damaging some of their nets. Her Majesty's Government have no hesitation in admitting that this proceeding was quite indefensible, and is much to be regretted. No sense of injury to their rights, however well founded, could, under the circumstances, justify the British fishermen in taking the law into their own hands, and committing acts of violence; but I will revert by and by to this feature in the case, and will now proceed to the important question raised in this controversy, whether, under the Treaty of Washington, the United States' fishermen are bound to observe the fishery regulations of Newfoundland in common with British subjects.

“Without entering into any lengthy discussion on this point, I feel bound to state that, in the opinion of Her Majesty's Government, the clause in the Treaty of Washington which provides that the citizens of the United States shall be entitled, ‘in common with British subjects,’ to fish in Newfoundland waters within the limits of British sovereignty, means that the American and the British fishermen shall fish in these waters upon terms of equality; and not that there shall be an exemption of American fishermen from any reasonable regulations to which British fishermen are subject.

“Her Majesty's Government entirely concur in Mr. Marcy's Circular of the 28th March, 1856. The principle therein laid down appears to them perfectly sound, and as applicable to the fishery provisions of the Treaty of Washington as to those of the Treaty which Mr. Marcy had in view. They cannot, therefore, admit the accuracy

of the opinion expressed in Mr. Evarts' letter to Mr. Welsh of the 28th September, 1878, 'that the fishery rights of the United States conceded by the Treaty of Washington are to be exercised wholly free from the restraints and regulations of the Statutes of Newfoundland,' if by that opinion anything inconsistent with Mr. Marcy's principle is really intended. Her Majesty's Government, however, fully admit that, if any such local Statutes could be shown to be inconsistent with the express stipulations, or even with the spirit of the Treaty, they would not be within the category of those reasonable regulations by which American (in common with British) fishermen ought to be bound; and they observe, on the other hand, with much satisfaction, that Mr. Evarts, at the close of his
 40 letter to Mr. Welsh of the 1st August, 1879, after expressing regret at 'the conflict of interests which the exercise of the Treaty privileges enjoyed by the United States appears to have developed,' expressed himself as follows:—

"There is no intention on the part of this [the United States'] Government that these privileges should be abused, and no desire that their full and free enjoyment should harm the colonial fishermen.

"While the differing interests and methods of the shore fishery and the vessel fishery make it impossible that the regulation of the one should be entirely given to the other, yet if the mutual obligations of the Treaty of 1871 are to be maintained, the United States' Government would gladly co-operate with the Government of Her Britannic Majesty in any effort to make those regulations a matter of reciprocal convenience and right, a means of preserving the fisheries at their highest point of production, and of conciliating a community of interest by a just proportion of advantages and profits.'

"Her Majesty's Government do not interpret these expressions in any sense derogatory to the sovereign authority of Great Britain in the territorial waters of Newfoundland, by which only regulations having the force of law within those waters can be made. So regarding the proposal, they are pleased not only to recognize in it an indication that the desire of Her Majesty's Government to arrive at a friendly and speedy settlement of this question is fully reciprocated by the Government of the United States, but also to discern in it the basis of a practical settlement of the difficulty; and I have the honour to request that you will inform Mr. Evarts that Her Majesty's Government, with a view to avoiding further discussion and future misunderstandings, are quite willing to confer with the Government of the United States respecting the establishment of regulations under which the subjects of both parties to the Treaty of Washington shall have the full and equal enjoyment of any fishery which under that Treaty is to be used in common. The duty of enacting and enforcing such regulations, when agreed upon, would, of course, rest with the Power having the sovereignty of the shore and waters in each case."

6. In 1905 the United States objected (19th October, 1905) to a Newfoundland statute (British Case, App., p. 757), upon the ground that, under its provisions, United States fishing vessels might be seized for doing that which the treaty permitted them to do. (British Case, App., p. 494.)

After some discussion the position of the United States was formulated by Mr. Root in his letter of the 30th June, 1906, in the following terms:—

“The Government of the United States fails to find in the Treaty any grant of right to the makers of Colonial law to interfere at all, whether reasonably or unreasonably, with the exercise of the
41 American rights of fishery, or any right to determine what would be a reasonable interference with the exercise of that American right if there could be any interference.” (British Case, App., p. 499.)

And referring to some specific local laws, he added (British Case, App., p. 501.)

“If it be shown that these things are reasonable the Government of the United States will agree to them, but it cannot submit to have them imposed upon it without its consent.”

Sir Edward Grey, in his reply of the 2nd February, 1906 (British Case, App., p. 495), stated that His Majesty's Government held the view that—

“the only ground on which the application of any provisions of the colonial law to American vessels engaged in the fishery can be objected to, is that it unreasonably interferes with the exercise of the American right of fishery.”

It is submitted that this evidence establishes—

1. That Great Britain has throughout maintained the construction for which she now contends, and that she put it forward officially in 1855 on the first occasion when any question arose.

2. That no objection was ever taken by the United States to the validity of British regulations until 1878, in the Fortune Bay Case.

REGULATIONS ON TREATY COASTS.

The following is a list of the fishing regulations in force from time to time on the coasts of the British American Colonies while the 1783 treaty was in force, and in Newfoundland since the date of the treaty of 1818:—

1611.—Regulations for the Newfoundland coast-fisheries were issued by John Guy, Governor. (British Case, App., p. 689.)

1653.—Regulations to somewhat similar effect were contained in the instructions to John Treworgie, Commissioner for Newfoundland. (British Case, App., pp. 511–22.)

1660.—Somewhat similar regulations were contained in the Star Chamber Rules of Charles I. (British Case, App., p. 512.)

1665.—Regulations were issued by Thomas Temple, the Governor of Nova Scotia. (British Case, App., p. 586.) They applied to “Nova Scotia and L'Acady, and the harbours and seas thereunto belonging,” and provided *inter alia* that none should fish or work about

their fish on the Lord's day; that no fish should be taken during the spawning season; and that offal should not be thrown on the fishing grounds.

42 1670.—Additions to the Star Chamber regulations of Charles I were made by Charles II. (British Case, App., p. 518.)

1699.—The previously existing regulations relating to Newfoundland were extended and embodied in the British statute 10 & 11 Wm. III, c. 25 (British Case, App., p. 525) :—

Sec. I gave permission to "all His Majesty's subjects residing within this his realm of England, or the dominions thereunto belonging," to have the free use of the fishery with liberty to go on shore "for the curing, salting, drying, and husbanding of their fish."

Sec. II prohibited the throwing overboard of ballast, prest stones, or anything else hurtful to the harbours.

Sec. III provided regulations with reference to conduct on shore in the drying and curing of fish.

Sec. IV provided that the first arrival from England, Wales, or Berwick in any Newfoundland harbour or creek should be the Admiral; the second, Vice-Admiral; and the third, Rear-Admiral; that reasonable parts of the beach only should be monopolised; and that the admirals should settle all disputes.

Sec. XII prohibited casting anchor, &c., "to the annoyance or hindering of the hauling of seines"; the casting of seines within or upon the seines of other persons; the stealing of bait out of boats or nets, &c.

Sec. XIV authorised and required the admirals to enforce the prescribed rules.

Sec. XV gave jurisdiction to the admirals to settle certain classes of disputes.

Sec. XVI enjoined strict observance of the Lord's day.

1765.—The rules and regulations of the British statute of 10 & 11 Wm. III, c. 25 (British Case, App., p. 690), were made applicable to Labrador.

1770.—A Nova Scotia statute (10 Geo. III, c. 10) (British Case, App., p. 587) prohibited the throwing of offal into the sea within three leagues of the shore.

1786.—The British statute 26 Geo. III, c. 26, sec. 11 (British Case, App., p. 558), regulated the size of the mesh of nets to be used in catching cod-fish on the shores of Newfoundland.

1788.—The Lower Canada statute 28 Geo. III, c. 6 (British Case, App., p. 592), prohibited in certain places, including the Bay of Chaleurs, the casting of anchors or the doing of anything to annoy

or hinder the hauling of seines in the accustomed baiting
43 places; and shooting seines within, or upon, the seines of other
persons. It prohibited also the jettison into harbours of ballast, or anything else hurtful to them. And it gave jurisdiction to Justices of the Peace to settle disputes as to the right to occupy certain places on the shore.

1793.—The New Brunswick statute 33 Geo. III, c. 9 (British Case, App., p. 595), prohibited the placing of seines across rivers, coves, or creeks so as to obstruct the natural course of fish.

1807.—The Lower Canadian statute 47 Geo. III, c. 12 (British Case, App., p. 601), contained regulations regarding the discharge of ballast, throwing offal overboard, obstructing the hauling of seines, and gave to the judge of the provincial court, acting with two or more justices of the peace, power—

“to make and frame such reasonable orders, rules and regulations respecting the said fisheries, and all matters and things concerning the same, as may not be repugnant to this Act, . . . for regulating the manner of placing seines and nets in the havens, rivers, creeks and harbours in the said Inferior District of Gaspé, and to annex reasonable penalties and forfeitures” &c.

1818.—The New Brunswick statute 58 Geo. III, c. 2 (British Case, App., p. 605), prohibited the jettison of offal in any bay or harbour, at such places as cod or scale fish are usually taken.

1824.—The British statute 5 Geo. IV, c. 51 (British Case, App. p. 568), repealed the clause in the statute of 26 Geo. III, c. 26 (above referred to); by section 5 it prohibited the throwing into harbours in Newfoundland of ballast, stones, or anything else hurtful to them. It also prohibited (section 6) the casting of anchors, or the doing of—

“any other Matter or Thing to the Annoyance or hindering of the drawing or hauling of Nets or Seines in the customary Baiting Places in *Newfoundland*, or the Dependencies thereof,”

1838.—The Newfoundland statute 2 Vict., c. 7 (British Case, App., p. 697), regulated the disposal of ballast, stones, or any other things injurious or hurtful to any of the harbours or roadsteads.

1862.—The Newfoundland statute 25 Vict., c. 2 (British Case, App., p. 702), prohibited—

1. The taking of herrings in seines in any bays or harbours of Newfoundland or Labrador between the 20th October and the 12th April in any year; and the use of seines at any time, except
44 by way of shooting and forthwith tucking and hauling the same.

2. Taking herring with nets of certain description.

3. Removing, destroying, or injuring other persons' nets.

4. Taking herring between the 20th April and the 20th October for exportation within one mile of any settlement on a certain part of the coast.

1872.—The Newfoundland revised statute, c. 102 (British Case, App., p. 704), amended and re-enacted the statute of 1862.

1876.—The Newfoundland statute 39 Vict., c. 6 (British Case, App. p. 707), amended the revised statute in respect of the dates of the close season, and further prohibited—

1. Catching of squids by means of any seine, bunt, or other such contrivance.

2. Taking of herring, caplin, or squids with nets between 12 o'clock on Saturday night and 12 o'clock on Sunday night.

1877.—By the Newfoundland statute 40 Vict., c. 13 (British Case, App., p. 707), the Sunday prohibition was declared to apply to the jiggling of squids and the taking of fish for bait.

The Newfoundland statute of 1884, 47 Vict., c. 8 (British Case, App., p. 709), prescribed regulations with regard to the herring and cod fisheries.

The Newfoundland statute of 1889, 52 Vict., c. 7 (British Case, App., p. 717), constituted a Fisheries Commission with power to make rules and regulations. Section 16 was in the following terms:—

“The Commission shall have power to make and prescribe rules and regulations in relation to the prosecution of the several fisheries of the Colony; to the fixing of close seasons; to the methods, appliances, and contrivances to be used and adopted in and for the taking of fish and the times, seasons, and manner for and in which the same or any of them may be used or adopted, which rules or regulations may apply to such districts or places and for such periods and under such limitations as may therein be stated or defined, and to fix and impose penalties for the violation or non-performance of such rules and regulations and the mode of prosecution therefor, and from time to time to alter and repeal the same.”

Rules and regulations made under this section in 1890 are set out in the Appendix to the British Case, pp. 718–720.

45 1892.—The Consolidated Statutes of Newfoundland (second series), c. 124 (British Case, App., p. 725), contained elaborate provisions as to the manner in which the coast fisheries were to be prosecuted. They will be found on pp. 725–727 of the Appendix to the British Case.

1898.—The Newfoundland statute 61 Vict., c. 3 (British Case, App., p. 731), established the Department of Marine and Fisheries. Section 9 is in the following terms:—

“The Governor in Council may, from time to time, make regulations for the better management and regulation of the sea, coast, and inland fisheries, to prevent or remedy the obstruction and pollution of streams, to regulate and prevent fishing, to prohibit the destruction

of fish, and to forbid fishing except under authority of leases or licenses; which regulations shall have the same force and effect as if herein enacted, and may fix such modes, times or places as are deemed by the Governor in Council adapted to different localities, or otherwise expedient."

Under this section the regulations were made which will be found at pages 760 to 769 of the Appendix to the British Case.

CONCLUSION.

In conclusion His Majesty's Government submits that the treaty of 1818 places no restriction on the right of Great Britain, Canada and Newfoundland to make and enforce reasonable regulations on the treaty coasts in respect of the matters referred to in Question 1, and that the consent of the United States is not necessary to the validity of such regulations.

QUESTION TWO.

AMERICAN FISHERMEN.

Have the inhabitants of the United States, while exercising the liberties referred to in said article, a right to employ, as members of the fishing crews of their vessels, persons not inhabitants of the United States?

THE CONTENTIONS.

The contentions of the two Governments are stated in the correspondence between Mr. Root and Sir Edward Grey. Mr. Root claimed that any American vessel was entitled to fish in treaty waters, and that men of any nationality or place of residence might be engaged to handle the ship, and its boats, or nets. Sir Edward Grey replied that the privilege of fishery was conceded by article 1, not to American vessels, but to inhabitants of the United States and to American fishermen. The most material passages in this correspondence are set out below.

Mr. Root, writing on the 19th October, 1905, formulated the claim of the United States in the following propositions (British Case, App., p. 492):—

“1. Any American vessel is entitled to go into the waters of the Treaty Coast and take fish of any kind.

“She derives this right from the Treaty (or from the conditions existing prior to the Treaty and recognized by it) and not from any permission or authority proceeding from the Government of Newfoundland.

“2. An American vessel seeking to exercise the Treaty right is not bound to obtain a licence from the Government of Newfoundland, and, if she does not purpose to trade as well as fish, she is not bound to enter at any Newfoundland custom-house.

“3. The only concern of the Government of Newfoundland with such a vessel is to call for proper evidence that she is an American vessel, and, therefore, entitled to exercise the Treaty right, and to have her refrain from violating any laws of Newfoundland not inconsistent with the Treaty.

“4. The proper evidence that a vessel is an American vessel and entitled to exercise the Treaty right is the production of the ship's papers of the kind generally recognized in the maritime world as evidence of a vessel's national character.

"5. When a vessel has produced papers showing that she is an American vessel, the officials of Newfoundland have no concern with the character or extent of the privileges accorded to such a vessel by the Government of the United States. No question as between a registry and licence is a proper subject for their consideration. They are not charged with enforcing any laws or regulations of the United States. As to them, if the vessel is American she has the Treaty right, and they are not at liberty to deny it.

"6. If any such matter were a proper subject for the consideration of the officials of Newfoundland, the statement of this Department that vessels bearing an American Registry are entitled to exercise the Treaty right should be taken by such officials as conclusive."

Replying to these assertions, Sir Edward Grey, in a memorandum sent to Mr. Whitelaw Reid (2nd February, 1906), said, as to the first of them (British Case, App., p. 494):—

"The privilege of fishing conceded by Article 1 of the Convention of 1818 is conceded, not to American vessels, but to inhabitants of the United States and to American fishermen.

"His Majesty's Government are unable to agree to this or any of the subsequent propositions if they are meant to assert any right of American vessels to prosecute the fishery under the Convention of 1818 except when the fishery is carried on by inhabitants of the United States. The Convention confers no rights on American vessels as such. It enures for the benefit only of inhabitants of the United States."

Mr. Root replied in a letter to Mr. Whitelaw Reid (30th June, 1906) (British Case, App., p. 498):—

"We may agree that ships, strictly speaking, can have no rights or duties, and that whenever the Memorandum, or the letter upon which it comments, speaks of a ship's rights and duties, it but uses a convenient and customary form of describing the owner's or master's right and duties in respect of the ship. As this is conceded to be essentially 'a ship fishing,' and as neither in 1818 nor since could there be an American ship not owned and officered by Americans, it is probably quite unimportant which form of expression is used.

"I find in the Memorandum no substantial dissent from the first proposition of my note to Sir Mortimer Durand of the 19th October, 1905, that any American vessel is entitled to go into the waters of the Treaty coast and take fish of any kind, and that she derives this right from the Treaty and not from any authority proceeding from the Government of Newfoundland.

"Nor do I find any substantial dissent from the fourth, fifth, and sixth propositions, which relate to the method of establishing the nationality of the vessel entering the Treaty waters for the purpose of fishing, unless it be intended, by the comments on those propositions, to assert that the British Government is entitled to claim that, when an American goes with his vessel upon the Treaty coast for the purpose of fishing, or with his vessel enters the bays or harbours of the coast for the purpose of shelter and of repairing damages therein, or of purchasing wood, or of obtaining

water, he is bound to furnish evidence that all the members of his crew are inhabitants of the United States. We cannot for a moment admit the existence of any such limitation upon our Treaty rights. The liberty assured to us by the Treaty plainly includes the right to use all the means customary or appropriate for fishing upon the sea, not only ships and nets and boats, but crews to handle the ships and the nets and the boats. No right to control or limit the means which Americans shall use in fishing can be admitted unless it is provided in the terms of the Treaty, and no right to question the nationality of the crews employed is contained in the terms of the treaty."

In Sir Edward Grey's reply (addressed to Mr. Whitelaw Reid, the 20th June, 1907), he said (British Case, App., p. 507) :—

"His Majesty's Government, on the one hand, claim that the Treaty gave no fishing rights to American vessels as such, but only to inhabitants of the United States and that the latter are bound to conform to such Newfoundland laws and regulations as are reasonable and not inconsistent with the exercise of their Treaty rights. The United States Government, on the other hand, assert that American rights may be exercised irrespectively of any laws or regulations which the Newfoundland Government may impose, and agree that as ships strictly speaking can have no rights or duties, whenever the term is used, it is but a convenient or customary form of describing the owners' or masters' rights. As the Newfoundland fishery, however, is essentially a ship fishery, they consider that it is probably quite unimportant which form of expression is used.

"By way of qualification Mr. Root goes on to say that if it is intended to assert that the British Government is entitled to claim that, when an American goes with his vessel upon the Treaty Coast for the purpose of fishing, or with his vessel enters the bays or harbours of the coast for the purpose of obtaining shelter, and of repairing damages therein, or of purchasing wood, or of obtaining water, he is bound to furnish evidence that all the members of the crew are inhabitants of the United States, he is obliged entirely to dissent from any such proposition.

"The views of His Majesty's Government are quite clear upon this point. The Convention of 1818 laid down that the inhabitants of the United States should have for ever in common with the subjects of His Britannic Majesty the liberty to take fish of every kind on the coasts of Newfoundland within the limits which it proceeds to define.

"This right is not given to American vessels, and the distinction is an important one from the point of view of His Majesty's Government, as it is upon the actual words of the Convention that they base their claim to deny any right under the Treaty to American
50 masters to employ other than American fishermen for the taking of fish in Newfoundland Treaty waters.

"Mr. Root's language, however, appears to imply that the condition which His Majesty's Government seek to impose on the right of fishing is a condition upon the entry of an American vessel into the Treaty waters for the purpose of fishing. This is not the case. His Majesty's Government do not contend that every person on board an American vessel fishing in the Treaty waters must be an inhabitant of the United States, but merely that no such person is entitled to

take fish unless he is an inhabitant of the United States. This appears to meet Mr. Root's argument that the contention of His Majesty's Government involves as a corollary that no American vessel would be entitled to enter the waters of British North America (in which inhabitants of the United States are debarred from fishing by the Convention of 1818) for any of the four specified purposes, unless all the members of the crew are inhabitants of the United States.

"Whatever may be the correct interpretation of the Treaty as to the employment of foreigners generally on board American vessels, His Majesty's Government do not suppose that the United States Government lay claim to withdraw Newfoundlanders from the jurisdiction of their own Government so as to entitle them to fish in the employment of Americans in violation of Newfoundland laws. The United States Government do not, His Majesty's Government understand, put their claim higher than that of a 'common' fishery, and such an arrangement cannot override the power of the Colonial Legislature to enact laws binding on the inhabitants of the colony.

"It can hardly be contended that His Majesty's Government have lost their jurisdiction not only over American fishermen fishing in territorial waters of Newfoundland, but also over the British subjects working with them."

POINTS FOR DISCUSSION.

The occasion that immediately gave rise to this question was the employment of British subjects in the fishery carried on by the inhabitants of the United States in Newfoundland waters. American fishermen have during recent years claimed the right to send vessels to those waters with crews sufficient only to navigate the vessels themselves, and to rely, for the catching of fish, on Newfoundland fishermen to be engaged there. Under such a system the fishing operations, while financed and controlled by inhabitants of the United States, are really carried on by British subjects. As appears from the correspondence between the two Governments, the right to hire local fishermen is one of the points to which the United States have attached great importance. (British Case, App., p. 509.)

51 Under the Newfoundland Foreign Fishing Vessels Act, 1905, the engaging of any person to form part of the crew of a foreign fishing vessel in any port or any part of the coasts of the island was made an offence punishable with forfeiture of the vessel. It was out of this legislation, and further proposed legislation on the same lines in 1906, that the discussion on the question under consideration arose.

But the difference is not confined to the employment of British subjects. It has already been pointed out in the British Case that the crews of American vessels are largely composed of foreigners, Norwegians, Portuguese, &c., and the contention of the United States is that any number of foreigners may be employed in fishing under the treaty in British waters.

The first point for discussion, therefore, is the general question whether the treaty gives any right to the inhabitants of the United States to employ fishermen of other nationalities, not being inhabitants of the United States, to fish for them at all.

If that be decided in the affirmative, contrary to the contention of His Majesty's Government, then the further point arises whether the employment of British subjects, or of persons resident in the Colonies, may be prohibited by British legislation without breach of the treaty.

In the Counter-Case of the United States it is suggested that this second point is not within the scope of the question referred to the Tribunal. But the prohibition of the employment of British subjects in these fisheries was one of the matters which occasioned the reference to arbitration, and it is clearly submitted to the Tribunal. Great Britain contends that she may prohibit any inhabitant of the Colonies from engaging to fish for Americans in British waters without breach of the treaty. If that be not conceded, His Majesty's Government must ask for an express decision upon the point. (United States Counter-Case, p. 45.)

LANGUAGE OF THE TREATY.

His Majesty's Government submits that the language of the treaty is clear and that the contention of the United States is inconsistent with that language.

52 The treaty in terms limits the liberties to inhabitants of the United States, whereas by the interpretation put upon it by the United States the liberties were conferred upon all nations and races, wherever their habitations, provided solely that they operated from an American vessel.

It is said, indeed, that an American vessel must, according to the laws of the United States now in force, be owned and officered by Americans. That is a matter which must depend on the will of the United States. But even if those laws remain in force, the effect of the contention is that while the officers of American vessels must be Americans, the men who do the actual fishing may be exclusively non-inhabitants of the United States; in other words, that although the treaty gives liberties to, alternatively, "inhabitants of the United States" and "American fishermen," yet that the liberties may be exercised by persons who are neither inhabitants nor Americans.

The change which would be effected by acceptance of the United States interpretation is thus seen to be far-reaching in its effect. It alters the plain language of the article and does away with the limitation contained in it. A grant confined to the inhabitants of the United States is very different in extent from a grant to all persons whom those inhabitants may choose to employ.

The United States Counter-Case, in commenting on that part of the British Case which speaks of the treaty liberty as being (British Case, p. 58)—

“a liberty to a specific class of persons to take fish themselves,” proceeds as follows (United State Counter-Case, p. 53):—

“Clearly, however, no such interpretation of the language of the treaty is permissible, for by its express terms the American liberty of fishing is for the benefit of any of the inhabitants of the United States, and is not restricted to the fishermen, so that any of the persons who are inhabitants of the United States are entitled to employ, or be employed by, any other persons who are inhabitants of the United States in the enjoyment of the fishing liberty under this treaty.”

It is agreed that an inhabitant of the United States may fish, and that it is quite immaterial whether he is fishing for himself or under contract for some other inhabitant. It is when the United
53 States says that an inhabitant of the United States may employ others who are not inhabitants—who are not members of the specific class—that His Majesty’s Government ventures to disagree.

SITUATION IN 1783 AND IN 1818—POLICY OF GREAT BRITAIN.

The same words, “inhabitants of the United States” and “American fishermen,” are used in the treaties of 1783 and 1818, and the situation existing at those dates may therefore be thought material on the question of construction. At those dates and for many years previously, the policy of Great Britain had been directed to the exclusion of foreigners from the North Atlantic fisheries, a policy to which effect had consistently been given by treaties and legislation. One of the main objects of the policy was to maintain the fisheries as nurseries for the seamen of Great Britain. It is impossible to accept the suggestion that the treaty of 1818 was an abandonment of that policy.

England’s encouragement of fisheries had for its purpose, first, naval supremacy, and secondly, an increase of wealth. Everywhere in British history—in statutes, negotiations, and avowed policy, the value of fisheries as nurseries of seamen is a conspicuous object of national requirement. France, for similar reasons, has always regarded the Newfoundland fisheries as an inestimable asset. And the United States, when struggling for independence, learned that but for the French fleet, built up by fisheries, her chance of success would have been very seriously diminished.

Short reference to some of the British statutes indicative of the national purpose to use the fisheries as nurseries of seamen will serve

to remind the Tribunal of the great importance which in those disturbed times was attributed to the importance of naval strength. The most important of them are the following:—

1660.—Star Chamber Rules of Charles I and additions by Charles II. (British Case, App., p. 512.)

1670.—Order-in-Council of Charles II. (Ibid., p. 519.)

1675.—Report of the Lords Commissioners for Trade and Plantations relating to the Newfoundland trade and fishery. (Ibid., p. 529.)

1699.—An Act to encourage the trade to Newfoundland, 10 & 11 Wm. III, c. 25. (Ibid., p. 525.)

54 1775.—An Act for the encouragement of the fisheries, &c., 15 Geo. III, c. 31. (Ibid., p. 543.)

1786.—An Act to amend the several laws in force for encouraging the fisheries, 26 Geo. III, c. 26. (Ibid., p. 555.)

POLICY OF UNITED STATES.

At the very commencement of their national existence, the United States were most keenly alive to the necessity of an adequate supply of seamen. In the instructions to the United States Minister at Paris (Dr. Franklin) it was stated that (United States Case, App., p. 1148)—

“the fishery of Newfoundland is justly considered the basis of a good marine;”

Mr. Rush, one of the United States negotiators of the treaty of 1818, referring to its fishery privileges, said (Ibid., p. 319):—

“These were rights and liberties of great magnitude to the United States. Besides affording profitable fields of commerce, they fostered a race of seamen, conducive to the national riches in peace, as to defence and glory in war.”

In the letter of Mr. Everett (United States Ambassador at London) to Lord Aberdeen (25th March, 1845) there is the following (British Case, App., p. 144):—

“The government of the United States, he is persuaded, would gladly make any reduction in these duties which would not seriously injure the native fishermen; but Lord Aberdeen is aware that the encouragement of this class of the seafaring community has ever been considered, as well in the United States as Great Britain, as resting on peculiar grounds of expediency. It is the great school not only of the commercial but of the public marine, and the highest considerations of national policy require it to be fostered.”

Further reference to the subject may be found in the United States Case, Appendix 628; 1058 ff; 1256. It is unnecessary to multiply quotations to show the attitude of the United States Government upon this question.

The great importance attached to fisheries as training-grounds for seamen is also attested by the bounties with which the industry has been encouraged by the United States as well as by other countries, notably France.

In view of all this, the precise significance of the term "American fishermen" as employed in the treaties of 1783 and 1818 becomes very apparent. The fisheries were desired not merely as a source of wealth but as yielding a supply of sailors.

ENLARGEMENT OF TREATY RESULTING FROM EMPLOYMENT OF FOREIGNERS.

It is important to observe how the introduction of foreign fishermen in American vessels would enlarge the privileges given by other treaties. Take the case of French fishermen.

By the treaty of 1763, France ceded Canada, Cape Breton, and all the islands in the Gulf of St. Lawrence to Great Britain, and in the treaty occurred the following clause (British Case, App., p. 8) :—

"And His Britannic Majesty consents to leave to the subjects of the Most Christian King the liberty of fishing in the Gulf of St. Lawrence, on condition that the subjects of France do not exercise the said fishery but at the distance of three leagues from all the coasts belonging to Great Britain, as well those of the continent as those of the islands situated in the said Gulf of St. Lawrence. And as to what relates to the fishery on the coasts of the Island of Cape Breton, out of the said gulf, the subjects of the Most Christian King shall not be permitted to exercise the said fishery but at the distance of 15 leagues from the coasts of the Island of Cape Breton; and the fishery on the coasts of Nova Scotia or Acadia, and everywhere else out of the said gulf, shall remain on the foot of former treaties."

By the same treaty Great Britain ceded the islands of St. Pierre and Miquelon to France,

"to serve as a shelter to the French fishermen."

On the same day as that upon which the United States obtained liberty for American fishermen to fish in British coast waters (3rd September, 1783), another treaty between the United Kingdom and France renewed the provisions of their previous treaty, and thus French fishermen were to remain under exclusion to the distances mentioned from the shore: that is, to a distance of 30 leagues from the Nova Scotia coast; 15 leagues from the Cape Breton coast; and 3 leagues from the coasts in the Gulf.

The declaration of the French King which accompanied this last treaty contained the following (British Case, App., p. 12) :—

"In regard to the fishery between the Island of Newfoundland and those of St. Pierre and Miquelon, it is not to be carried on, by either party, but to the middle of the channel; and His Majesty will give the most positive orders, that the French fish-

ermen shall not go beyond this line. His Majesty is firmly persuaded that the King of Great Britain will give like orders to the English fishermen."

The object and the effect of these treaties are very clear: but the object will not have been obtained, and the effect will be completely changed, if it be held that French fishermen may evade their treaty-exclusion by hiring American vessels or by taking service under inhabitants of the United States.

Again, take the case of Spanish fishermen. By the treaty of 1763 the King of Spain agreed to desist (British Case, App., p. 10)—

"from all pretension which he may have formed in favour of the Guipuscoans, and other his subjects, to the right of fishing in the neighbourhood of the island of Newfoundland."

It is obvious that if the inhabitants of the United States are to be at liberty to engage foreign fishermen the way would be open to wholesale evasion of these and all other treaties excluding foreign fishermen.

It may be added that the statute of 10 & 11 Wm. III, c. 25, An Act to encourage the trade to Newfoundland, provided (British Case, App., p. 525)—

"that no alien or stranger whatsoever (not residing within the kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*) shall at any time hereafter take any bait, or use any sort of trade or fishing whatsoever in *Newfoundland* or in any of the said islands or places abovementioned."

The treaties with the United States provided for admission of aliens inhabiting the United States to certain of the fisheries. But if the contention of the United States be correct, the clause could not afterwards have been enforced against any alien in the world whom an inhabitant of the United States might introduce into the fisheries.

REASONS FOR CONCESSION GRANTED IN 1818.

The course of the negotiations of 1818 shows that the United States attached importance to the fisheries because they formed the industry of the fishing communities of the Eastern States. It was in the interests of the fishermen living in the United States, that appeals were made to Great Britain.

57 Allusion is made to this point in the United States Counter-Case in the following terms (United States Counter-Case, p. 48):—

"The British Case suggests as one of the principal grounds for construing the treaty in accordance with the British contention that such construction would give effect to the intentions of the negotiators. In support of this view, it is stated that an argument was made

by the American negotiators (although no such argument is reported in the published records of the negotiations) 'that there was a large population in the United States wholly dependent for their means of livelihood on the fisheries, and they appealed to the benevolence and humanity of Great Britain to preserve this industry to this community.'"

The statement in the British Case, referred to in the above passage, is borne out by the evidence before the Tribunal. In the negotiations which led up to the treaty, Mr. John Quincy Adams was unable to convince the British Government of the justice of any claim of right to participation in British coast-fisheries, but he strongly urged, among other arguments, that which has been just referred to. In a conversation with Lord Bathurst in September 1815, Mr. Adams said (British Case, App., p. 66) :—

"These fisheries afforded the means of subsistence to multitudes of people who were destitute of any other; they also afforded the means of remittance to Great Britain in payment for articles of her manufacturers exported to America."

In a letter to Lord Bathurst (25th September, 1815), Mr. Adams reiterated his oral argument, and said (British Case, App., p. 68) :—

"In the interview with which your Lordship recently favoured me, I suggested several other considerations, with the hope of convincing your Lordship that, independent of the question of rigorous right, it would conduce to the substantial interests of Great Britain herself, as well as to the observance of those principles of benevolence and humanity which it is the highest glory of a great and powerful nation to respect, to leave to the American fishermen to participation of those benefits which the bounty of nature has thus spread before them; which are so necessary to their comfort and subsistence;"

Replying, at a later date (22nd January, 1816), to a letter received from Lord Bathurst, Mr. Adams said (British Case, App., p. 76) :—

"In submitting these reflections to the consideration of His Majesty's Government, the undersigned is duly sensible to the amicable and conciliatory sentiments and dispositions towards the United States manifested at the conclusion of Lord Bathurst's note, which will be met by reciprocal and corresponding sentiments and dispositions on the part of the American Government. It will be highly satisfactory to them to be assured that the conduciveness of the object to the national and individual prosperity of the inhabitants of the United States operates with His Majesty's Government as a forcible motive to concession."

If Mr. Adams were now United States Secretary of State he would surely agree that the "American fishermen" and the "inhabitants of the United States" referred to in the treaty which he was then negotiating are identical with the "American fishermen" on whose behalf he made his appeal to the British Government; that he was not negotiating on behalf of men of any nationality but his own;

and that the British Government did not intend to grant concessions to persons other than those described in his letter.

In answer to this point, the United States assert that the object that the negotiators had in view was (United States Counter-Case, p. 49)—

“to encourage and make profitable the American fisheries as a source of revenue for the benefit of Great Britain.”

Undoubtedly that was within the view of the British Government; but it is clear that the object which the American negotiators had in view was the promotion of the welfare and prosperity of their own people.

ANALOGY OF TREATY OF 1871.

By the treaty of Washington, between the United Kingdom and the United States (1871), it was agreed (British Case, App., p. 39)—
“that, in addition to the liberty secured to the United States fishermen by the convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, The inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish,” &c.,

on additional British coasts. And it was also agreed—

59 “that British subjects shall have, in common with the citizens of the United States, the liberty to take fish,” &c.,

on certain United States coasts.

This treaty forms a parallel to the one under discussion, and of it a United States Secretary of State (Mr. Evarts) formed the same opinion as that now contended for by His Majesty's Government. In a report to the President of the United States (17th May, 1880) he said (British Case, App., p. 284):—

“There was, to be sure, a restriction imposed upon both countries which excluded both equally from extending the enjoyment of either's share of the common fishery beyond the ‘inhabitants of the United States’ on the one side, and ‘Her Britannic Majesty's subjects’ on the other, thus disabling either Government from impairing the share of the other by introducing foreign fishermen into the common fishery.”

There was, however, no restriction on the American rights other than that contained in the use of the words “the inhabitants of the United States,” the very words used in the convention of 1818.

Commenting upon this paragraph, the United States say (United States Counter-Case, p. 51):—

“The British Case fails to state, however, that Great Britain did not agree with the views expressed by Mr. Evarts, and that so far as they have any application to the treaty of 1818, Great Britain distinctly repudiated any such views by undertaking in the treaty of 1857 with France to introduce foreign fishermen into these fisheries. By

Article III of that treaty, it was agreed that 'French subjects shall have the right, concurrently with British subjects, to fish on the coasts of Labrador from Blanc Sablon to Cape Charles and of North Belleisle, together with liberty to dry and cure fish on any of the portions of North Belleisle aforesaid, which shall not be settled when this Convention shall come into operation'; which provisions would have resulted, if the treaty had gone into operation, in the very thing which the British Case now claims that the United States cannot do."

His Majesty's Government is not aware that Great Britain ever expressed dissent from Mr. Evarts' view. In offering access to a part of the Labrador coast, the British Government did not admit in any way that a grant to the inhabitants of a particular country to fish on the coasts of another country would entitle these inhabitants to introduce foreigners. The action of Great Britain in 1857,
 60 which is referred to, had no reference to this point, but solely to the right of Great Britain as owners of the coast, and whatever view may be taken on that subject it does not touch the present controversy.

WIDE EFFECT OF UNITED STATES CONTENTION

It is to be observed in this connection that the claim of the United States now under consideration becomes still more formidable when it is considered with reference to another claim that has been submitted to this Tribunal. For the United States claim not merely the liberties of taking fish in British waters, and of drying and curing fish upon British shores, with the help of men of any nationality in the world, but also, under the head of commercial privileges, the right of all such men to land at British ports and to transact business there. Apart from such claim, too, American fishermen have by treaty the right to go ashore for the purpose of drying and curing their fish. Some Canadian laws, however, have for their purpose the exclusion of certain nationals from Canadian territory. And now Canada is confronted with the assertion that her policy, in this respect, is hampered by treaty liberties given to American fishermen in 1818.

If the treaty were to be construed in the manner contended for by the United States, then Great Britain has given a right to fish which for all practical purposes is unlimited in extent. If there is no limit to the number of fishermen who can be employed to fish for Americans, then there can be no restriction upon the extent of the fishery operations which can be carried on by them. It cannot be assumed, in the absence of express words, that Great Britain conceded a right so indefinite in extent and so greatly to the prejudice of British fishermen.

For these reasons it is submitted that persons other than inhabitants of the United States cannot be regarded as within the terms of the treaty, and that the rights conferred by article 1 with regard to fishing, and the drying and curing of fish, are confined to American fishermen.

EMPLOYMENT OF BRITISH SUBJECTS.

But, apart, from the general question as to the employment of foreigners, it is submitted that the right of the British and Colonial legislatures to prevent the employment of British subjects by Americans upon these fisheries is absolutely indisputable. The inhabitants of Newfoundland, or of any British Colony, are subject to the legislation of that Colony and of the Imperial Parliament. It is within the competency of the legislature to which they are subject to forbid them to engage in any such industry. The treaty contains no expressions from which it can be inferred that His Majesty's Government parted with its control over its own subjects, and His Majesty's Government submits that the prevention of inhabitants of the Colonies from taking service with Americans fishing in British waters under the treaty of 1818 would not be a breach of that treaty.

CONCLUSION.

For these reasons His Majesty's Government contends that the conclusions stated in the British Case have been established, namely:—

1. That Article I means what in terms it says, and that it confers the liberty to take fish on the inhabitants of the United States, and not on the inhabitants of other countries.

2. That the Colonial legislatures and the Imperial Parliament retain the power of prohibiting any of His Majesty's subjects from engaging as fishermen in American vessels, and that the exercise of this power is in no way inconsistent with the treaty.

CUSTOMS ENTRIES AND LIGHT AND HARBOUR DUES IN TREATY WATERS.

Can the exercise by the inhabitants of the United States of the liberties referred to in the said article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses, or the payment of light, or harbour, or other dues, or to any other similar requirement, or condition, or exaction?

The question is whether the inhabitants of the United States, coming to fish under the treaty, are exempt from the requirement as to entry and report, and the payment of dues which are imposed upon vessels generally.

All claim on behalf of Americans, exercising the treaty rights in respect of fishing, to use their fishing-vessels for trading purposes as of right has now been abandoned by the United States. If commercial privileges for such vessels were claimed it would obviously be impossible to contend for exemption from customs regulations. But it is submitted that the United States are unable to point to anything in the treaty itself or in any of the surrounding circumstances which lends countenance even to the less extensive claim now put forward.

DIPLOMATIC CORRESPONDENCE.

The positions assumed by the two nations in the diplomatic correspondence which preceded the present reference are sufficiently shown in the following extracts:—

Mr. Root in his despatch of the 19th October, 1905, stated the United States position as follows (British Case, App., p. 492):—

“We consider that—

“1. Any American vessel is entitled to go into the waters of the Treaty Coast and take fish of any kind.

“She derives this right from the Treaty (or from the conditions existing prior to the Treaty and recognized by it) and not from any permission or authority proceeding from the Government of Newfoundland.

“2. An American vessel seeking to exercise the Treaty right is not bound to obtain a licence from the Government of Newfoundland, and, if she does not purpose to trade as well as fish, she is not bound to enter at any Newfoundland custom-house.”

64 Sir Edward Grey replied in his memorandum of the 2nd February, 1906, in the following terms (British Case, App., p. 495):—

“The United States’ Government, on their part, admit, in Mr. Root’s note, that the Colonial Government are entitled to have an American vessel engaged in the fishery refrain from violating any laws of Newfoundland not inconsistent with the Convention, but maintain that if she does not purpose to trade, but only to fish, she is not bound to enter at any Newfoundland custom-house.

“Mr. Root’s note refers only to the question of entry inwards, but it is presumed that the United States’ Government entertain the same views on the question of clearing outwards. At all events, American vessels have not only passed to the fishing grounds in the inner waters of the Bay of Islands without reporting at a Colonial custom-house, but have also omitted to clear on returning to the United States. In both respects they have committed breaches of the Colonial Customs Law, which, as regards the obligations to enter and to clear, makes no distinction between fishing- and trading-vessels.

“His Majesty’s Government regret not to be able to share the view of the United States’ Government that the provisions of the Colonial Law which impose those obligations are inconsistent with the Convention of 1818, if applied to American vessels which do not purpose to trade, but only to fish. They hold that the only ground on which the application of any provisions of the Colonial Law to American vessels engaged in the fishery can be objected to is that it unreasonably interferes with the exercise of the American right of fishery.

“It is admitted that the majority of the American vessels lately engaged in the fishery on the western coast of the Colony were registered vessels, as opposed to licensed fishing-vessels, and as such were at liberty both to trade and to fish. The production of evidence of the United States’ registration is therefore not sufficient to establish that a vessel, in Mr. Root’s words, ‘does not purpose to trade as well as fish,’ and something more would seem clearly to be necessary.

“The United States’ Government would undoubtedly be entitled to complain if the fishery of inhabitants of the United States were seriously interfered with by a vexatious and arbitrary enforcement of the Colonial Customs laws, but it must be remembered that, in proceeding to the waters in which the winter fishery is conducted, American vessels must pass in close proximity to several custom-houses, and that in order to reach or leave the grounds in the arms of the Bay of Islands, on which the fishery has been principally carried on during the past season, they have sailed by no less than three custom-houses on the shores of the bay itself. So that the obligation to report and clear need not in any way have interfered with a vessel’s operations. It must also be remembered that a fishery conducted in

65 the midst of practically the only centers of population on the west coast of the Colony affords ample opportunities for illicit trade, and consequently calls for careful supervision in the interests of the Colonial revenue.

“The provisions in question are clearly necessary for the prevention of smuggling, and His Majesty’s Government are of opinion

that exception cannot be taken to their application to American vessels as an unreasonable interference with the American fishery, and they entertain the strong hope that the United States' Government will, on reconsideration, perceive the correctness of this view, and issue instructions accordingly for the future guidance of those in charge of American vessels.

"It is, moreover, to the advantage of the American vessels engaged in the winter fishery in the Bay of Islands that they should report at a Colonial custom-house. Owing to the extent and peculiar configuration of that bay, and owing to the prevalence of fogs, vessels that enter its inner waters may remain for days without the local officers becoming aware that they are on the coast unless they so report. In such circumstances it is difficult for the Colonial Government to ensure to American fishermen that protection against lawless interference for which Mr. Root calls in the concluding part of his note.

"His Majesty's Government desire further to invite the attention of the United States' Government to the fact that certain United States' vessels engaged in the fishery refused to pay light dues. This is the first time, His Majesty's Government are informed, that American vessels have refused to pay these dues, and it is presumed that the refusal is based on the denial by the Colonial Government of the trading privileges allowed in past years. His Majesty's Government, however, cannot admit that such denial entitles American vessels to exemption from light dues in the ports in which they fish. As already stated, American fishing-vessels engaged in the fishery under the convention of 1818 have no Treaty status as such, and the only ground on which, in the opinion of His Majesty's Government, the application of any Colonial law to such vessels can be objected to is that such application involves an unreasonable interference with the exercise of the Treaty rights of the American fishermen on board. The payment of light dues by a vessel on entering a port of the Colony clearly involves no such interference. These dues are payable by all vessels of whatever description and nationality other than coasting- and fishing-vessels owned and registered in the colony (which are, on certain conditions, exempt either wholly or in part). His Majesty's Government trust that in these circumstances such directions will be issued as will prevent further refusals in the future, and they would point out generally that it is the duty of all foreigners sojourning in the limits of the British jurisdiction to obey that law, and that if, it is considered that the local jurisdiction is being exercised in a manner not consistent with the enjoyment of any Treaty rights, the proper course to pursue is not to ignore
66 the law, but to obey it, and to refer the question of any alleged infringement of their Treaty rights to be settled diplomatically between their Government and that of His Majesty."

Replying to this memorandum, Mr. Root said (British Case, App., p. 501):—

"The Government of Newfoundland cannot be permitted to make entry and clearance at a Newfoundland custom-house, and the payment of a tax for the support of Newfoundland lighthouses, conditions to the exercise of the American right of fishing. If it be shown

that these things are reasonable the Government of the United States will agree to them, but it cannot submit to have them enforced upon it without its consent."

REASONABLENESS OF CUSTOMS REGULATIONS.

His Majesty's Government does not understand that the United States intends to dispute the reasonableness of requiring United States fishermen to conform, under proper circumstances, to laws requiring observance of customs regulations and payment of light dues. Its position is that, whether such laws be reasonable or unreasonable, they are breaches of the treaty, unless assented to by the United States.

That the United States regarded such laws as being necessary and reasonable is shown by the fact that shortly after their independence they passed legislation on the same lines. Reference may be made to the statutes 1789, 31st July, c. 5; 1790, 4th August, c. 35; 1793, 18th February, c. 8; and 1799, 2nd March, c. 22 (British Case, App., pp. 777, 779, 782), imposing customs obligations on vessels arriving in the United States; and to the statute in force during the treaty period of 1871-1885, which contained the following provision (British Case, App., p. 788):—

"And be it further enacted, That it shall be the duty of the master of any foreign vessel, laden or in ballast, arriving in the waters of the United States from any foreign territory adjacent to the northern, northeastern, or northwestern frontiers of the United States, to report at the office of any collector or deputy collector of the customs, which shall be nearest to the point at which such vessel may enter said waters; and such vessel shall not proceed further inland, either to unlade or take in cargo, without a special permit from such collector or deputy collector, issued under and in accordance with such general or special regulations as the Secretary of the Treasury may in his discretion, from time to time, prescribe. And for any violation of this section such vessels shall be seized and forfeited."

CONSTRUCTION OF TREATY.

67 The United States appear to argue that the treaty gives a right to American fishermen to frequent the colonial coasts, bays, harbours, and creeks as they please; to go on shore, to dry and cure their fish, at such times as they choose; and that it does not, in terms, affix to those liberties, qualification or condition of any kind.

But liberty by treaty to enter the territory of a foreign country is always subject to the observance of the laws which may be in force there. A grant of liberty to the subjects of one State, to do certain acts in the territory of another State, does not of itself confer exemption from customs or other laws. On the contrary, aliens are invariably made subject to those laws unless there be an express exception

by treaty in their favour. And they are subject not only to the laws existing at the date of the treaty, but to those afterwards enacted. The United States has frequently given aliens liberty to enter the United States, but it has always applied to them the customs and other laws in force for the time being. And no one has heretofore suggested that the United States ought to obtain foreign assent before doing so. The position as stated in Hall's "International Law"^a is indisputable:—

"Whenever, or in so far as, a state does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights. Thus, for example, no treaty can be taken to restrict by implication the exercise of rights of sovereignty, or property, or self-preservation. Any restriction of such rights must be effected in a clear and distinct manner."

Many examples of treaties giving privileges of entry into alien territory can be cited in which no stipulation is made by way of reservation of the sovereign law-making power as against those who take advantage of the treaty; and yet the right of passing appropriate legislation, in such cases, has never been challenged. The treaty of 1794 between Great Britain and the United States only need be cited (British Case, App., p. 16):—

68 "It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties on the continent of America, (the country within the limits of the Hudson's Bay Company only excepted,) and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other."

But no one would suggest that those persons, so passing and repassing, could not be required to obey the local laws including regulations requiring entry or report at customs and payment of light, or harbour, or other dues.

LEGISLATION.

By the law of both Canada and Newfoundland the master of every vessel, whether laden or in ballast, coming from any foreign port or coastwise, is required, forthwith on arrival, to report his vessel at Customs, and to give information as to the name of the master, the country of the owners, the number and names of the passengers (if any,) the number of the crew, and whether laden or in ballast, and, if laden, the marks and numbers of every package, and to answer all such questions concerning the vessel, the cargo, the crew, and the voyage as are demanded of him. The Acts impose no fees on the masters in respect of such reports (British Case, App., pp. 661, 737).

^a 5th ed., p. 339.

It will be observed that the legislation is general in its terms and applies to all vessels coming into British waters. And it needs no argument to support the proposition that if such a large class of vessels as the United States fishing-vessels are to be exempt, the objects which the Acts aim at securing must, to a large extent, be defeated.

It is to be observed that customs legislation, similar in substance to the present statutes, was in force in Canada and Newfoundland prior to the treaty of 1818.

The British Statutes of 13 & 14 Charles II, chapter 11, entitled "An Act for preventing Fraud and regulating Abuses in His Majesty's Customs," required the masters of all vessels arriving in England to forthwith make entries at the customs (British Counter-Case, App., p. 209).

In 1696, a British Statute 7 & 8 Wm. III, cap. 22, entitled "An Act for preventing Frauds and regulating Abuses in the Plantation Trade," applied the provisions of the foregoing Act to vessels arriving in the British plantations in America (British Case, App., p. 521).

In 1767, another British Statute, 7 Geo. III, cap. 46, was passed to prevent more effectually the clandestine running of goods in the British Colonies and Plantations in America. Section 9 of that Act provided for the entry and clearance of vessels arriving in any British Colony or Plantation in America, and it required the master or person in charge of every such vessel, whether laden or in ballast, publicly in the open custom-house to answer upon oath such questions as were demanded of him by the Collector and Comptroller or other principal Officer of Customs concerning the ship and its destination or concerning any goods on board. The provisions of this clause are in all material points the same as those now in force (British Counter-Case, App., p. 221).

The British Colonies enacted legislation on similar lines. Reference may be made to the Statutes of Nova Scotia 8 & 9 Geo. III, cap. 18 (1769) (British Counter-Case, App., pp. 233, 234); Prince Edward Island 25 Geo. III, cap. 4 (1785); and New Brunswick 47 Geo. III, cap. 10 (1807) (British Case, App., p. 588).

Reference might be made to other British statutes, passed both before and after 1818, as illustrative of the great care exercised by Great Britain in the protection of the trade and commerce of her Colonies, but His Majesty's Government consider those already cited as sufficient for the present purpose.

Such being the state of the general law, attention must be called to a special modification of it.

The British Statute of 1775 (15 Geo. III, cap. 31) is entitled (British Case, App., p. 543)—

“An Act for the encouragement of the Fisheries carried on from *Great Britain, Ireland* and the *British* dominions in *Europe*, and for securing the return of the fishermen, sailors, and others employed in the said fisheries, to the ports thereof, at the end of the fishing season.”

After reciting that the fisheries carried on by His Majesty's subjects of Great Britain and of the British dominions in Europe, 70 had been found to be the best nurseries for seamen, and that it was, therefore, of the highest national importance to give all due encouragement to them, the statute provided for the payment of certain bounties to fishing-vessels owned by British subjects residing in Great Britain, or Ireland, or the islands of Guernsey, Jersey, or Man, and fitted out as described in the Act and employed in the fishery on the banks of Newfoundland, and it further provided as follows (British Case, App., p. 545):—

“And it is hereby further enacted by the authority aforesaid that from and after the first day of *January*, one thousand seven hundred and seventy-six, all vessels fitted and cleared out as fishing ships in pursuance of this Act, or of the before-mentioned Act, made in the tenth and eleventh years of the reign of the late King *William* the Third, and which shall be actually employed in the fishery there, or any boat or craft whatsoever employed in carrying coastwise, to be landed or put on board any ships or vessels, any fish, oil, salt, provisions, or other necessaries, for the use and purpose of that fishery, shall not be liable to any restraint or regulation with respect to days or hours of working, nor to make any entry at the custom-house at *Newfoundland*, except a report to be made by the master on his first arrival there, and at his clearing out from thence; and that a fee not exceeding two shillings and six-pence shall and may be taken by the officers of the customs at *Newfoundland* for each such report; and that no other fee shall be taken or demanded by any officer of the customs there, upon any other pretence whatsoever relative to the said fishery, any law, custom, or usage, to the contrary notwithstanding.

“VIII. Provided always, and be it enacted, That in case any such fishing ship or vessel shall at her last clearing out from the said Island of *Newfoundland* have on board, or export any goods or merchandise whatsoever, except fish, or oil made of fish, such ship or vessel, and the goods thereon laden, shall be subject and liable to the same securities, restrictions, and regulations, in all respects, as they would have been subject and liable to if this Act had not been made, anything herein before contained to the contrary notwithstanding.”

It thus appears that in 1776, when the United States declared their independence, the masters of all vessels coming into or going out of any British colony or plantation, whether laden or in ballast, were required to report at customs. But the masters of fishing-vessels from Great Britain, who would have to make frequent trips to Newfound-

land from the banks and would thereby be under heavy fees, under
 5 Geo. III, c. 45, sec. 27, and whom it was desired to favour,
 71 were partially relieved, being required to report on their first
 arrival and on their last clearance only, and to pay 2s. 6d. on
 each report. (British Counter-Case, App., p. 219.)

That being the state of matters it is difficult for His Majesty's Government to understand upon what argument it can successfully be contended that the inhabitants of the United States, upon being granted liberty to take fish and to land on shore to dry and cure their fish, became entitled to take vessels into British waters for the purpose of carrying on the fishery freed from the control exercised over all other vessels.

The requirement to enter or report at customs was only one feature of the laws then in force for the protection of trade and commerce. By the British Statute 4 Geo. III, cap. 15 (1763), any foreign ship or vessel found at anchor, or hovering within two leagues of the shore of any British-American colony, and failing to depart within 48 hours after notice, was liable to forfeiture. When the United States obtained their independence their vessels became foreign vessels, and would, under this clause of the Hovering Act applicable to the British Colonies, be prevented from anchoring or hovering within two leagues of British shores. While no express power was given by the treaty to American fishermen to bring and maintain their fishing-vessels within this limit, it is conceded that it was the intent of the treaty that they should be permitted to do so. Great Britain did not, however, abandon her right so to regulate and control these vessels, while carrying on their fishing operations, as to protect her trade and revenue, provided she did not unreasonably interfere with the exercise by the American fishermen of their treaty liberties. That the obligations imposed upon them by British and Colonial legislation since the date of the treaty of 1818, as to entry or report at Customs on the treaty shore, has not amounted to such an interference, is sufficiently established by the fact that no complaint was made prior to the diplomatic correspondence between Great Britain and the United States, which
 commenced in 1905. It seems clear, therefore, that legislation
 72 requiring American fishing-vessels to report at Customs would
 be a reasonable obligation to impose, even if there was no
 legislation to that effect in force at the date of the treaty. The fact that there was such legislation at that time puts the matter beyond question. (British Case, App., p. 532.)

In the United States Counter-Case (p. 58) it is asserted that the only port of entry in Newfoundland in 1775 was at St. John's, and that there were no custom-houses on the treaty coast when the treaty of 1818 was entered into. The only evidence offered in support of

this assertion is the British Statute 3 Geo. IV, cap. 44, in which a list of ports appears, at which entry under certain circumstances was permitted. The ports named in this list were "free ports" for the purposes mentioned in the Act. But there were many ports other than free ports, as the Statute clearly indicates, and it would be incorrect to infer that vessels could not be entered or reported at any port in Newfoundland except St. John's. (United States Counter-Case, App., p. 71.)

LIGHT DUES.

Writers on international law are agreed that nations which establish and maintain light-houses, sea-marks, and other things necessary to the safety of mariners may levy a reasonable tax upon the vessels using them. And it has never been suggested that the assent of other nations is necessary to the validity of such exactions.

Grotius, writing in 1625 (*De Jure Belli Ac Pacis*), said:—

"XIV. Neither is it contrary to the Law of Nature, or that of Nations, that those who shall take upon them the Burden and Charge of securing and assisting Navigation, either by erecting or maintaining Light-Houses, or by affixing Sea-Marks, to give Notice of Rocks and Sands, should impose a reasonable Tax upon those who sail that Way. Such was that which the Romans levied upon the *Red Sea*, to defray the Charge of a Fleet against the Excursions of Pirates; and that Duty which the *Byzantines* demanded in the *Euxin Sea*; and that which the *Athenians* long before imposed on the same Sea, when in Possession of *Chrysopolis*, both which are mentioned by *Polybius*. And that, which *Demosthenes*, in his Oration against *Leptines*, shews, the same *Athenians* required in the *Hellespont*; and which *Procopius* says, in his secret History, that the *Roman Emperors* exacted in his Time." ^a

73 The application of this rule, so far as it is not affected by considerations of treaty rights or privileges, is so universally acknowledged by all nations that it is not anticipated that any question will arise with regard to it. The only question, therefore, is whether the vessels of the American fishermen, arriving in the treaty waters of Canada or Newfoundland to exercise their treaty liberty, are exempt from the operation of this general principle.

At the outset it is to be observed that the treaty is altogether silent upon the subject. It does not in terms confer on Great Britain any right to levy such dues on American fishing-vessels, nor, on the other hand, does it prohibit their imposition. Indeed, the treaty makes no reference whatever to the vessels from which American fishermen may operate, or to the rights or liabilities of American fishermen in respect of them. It is submitted, therefore, that the right of Great Britain to impose these dues is not affected by the treaty, beyond the

^a English Edition of 1738, Book II, Chapter III.

implication that British requirements shall not be such as would amount to a practical denial of the privileges expressly granted by the treaty.

The imposition of certain dues on vessels to cover the expense of erecting and maintaining aids to navigation cannot be regarded as in any degree depriving the owners or masters of such vessels of any privileges conceded by the treaty. On the contrary it should be regarded as action properly taken by Great Britain with a view to providing facilities whereby the treaty liberty of the inhabitants of the United States may be safely enjoyed.

LEGISLATION.

Any suggestion that the right of Great Britain and her Colonies to levy light dues on American fishing vessels was annulled by the treaty of 1818 is completely answered by consideration of the course of events under the previous treaty of 1783, and the practice adopted by Great Britain and concurred in by the United States since that date.

It will be remembered that the treaty coast under the treaty of 1783 comprised the coasts of Nova Scotia and New Brunswick as well as of the other British North American colonies.

74 Shortly after the making of that treaty Nova Scotia passed a statute 28 Geo. III, c. 3 (1787), whereby light dues were levied on every merchant vessel coming into, or going out of, Shelburne Harbour, other than coasters and fishing vessels belonging to the province (British Case, App., p. 591).

By a subsequent Act of 1793 (33 Geo. III, c. 16) Nova Scotia levied light dues on every vessel coming into (British Case, App., p. 594)—“any port, harbour, creek or river within this province not being to the north-eastward of Cape Canso and not owned by some person or persons belonging to the province.”

In 1810, New Brunswick, by statute 50 Geo. III, c. 5 (British Case, App., p. 603), provided for the erection of beacons or buoys in the bays and harbours of Miramichi, Buctouche, Richibucto and Cocagne, and imposed dues to defray the expense on all vessels entering the said bays and harbours.

From these statutes it will be seen that while the treaty of 1783 was in force Great Britain, through her colonial legislatures, imposed light dues on all foreign vessels, including American fishing vessels. The tariffs of fees taken by the customs officers in Nova Scotia and in Newfoundland at that time show that anchorage fees were also charged. Great Britain and the Colonies have ever since assumed the right to impose these and similar exactions on American fishing vessels (British Counter-Case, App., pp. 171, 173).

LEGISLATION SUBSEQUENT TO 1818.

No lighthouses appear to have been established in Newfoundland until about the year 1834 (British Case, App., pp. 694, 695). In that year an Act was passed (4 Wm. IV, c. 4) to provide for the maintenance of a lighthouse at St. John's, and in the following year another Act was passed (5 Wm. IV, c. 7) to provide for the maintenance of a lighthouse at Conception Bay.

In 1839, Newfoundland, by statute 3 Vict., c. 5, imposed light dues on vessels entering any port within the colony from Cape Ray to Cape John. Under that Act, and the subsequent statutes of 1852 (15 Vict., c. 3), and 1855 (18 & 19 Vict., c. 5), fishing vessels were required to pay light dues. This situation continued until 1899 (62 & 63 Vict., c. 19) when local fishing vessels, whilst not engaged otherwise than in that business, were relieved from these dues (British Case, App., pp. 697, 699, 700, 754).

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SUMMARY.

It will thus be seen that throughout the legislation of Newfoundland, light dues have always been levied on all foreign vessels, including American fishing vessels, entering treaty waters. No complaint was ever made by the United States against the imposition of these Newfoundland light dues until 1905, when the United States first contended that their fishing vessels should not, without the assent of the United States, be obliged to pay them.

In view of the action of Great Britain in imposing these light dues under both the treaty of 1783 and the treaty of 1818, and the long acquiescence in the payment of such dues on the part of the inhabitants of the United States, it seems difficult to understand upon what ground the United States now contend that such action on the part of Great Britain is in conflict with the liberty granted by the treaty.

It has been suggested that having regard to the manner in which light dues are now levied, they do not bear evenly on the American fishermen and the Newfoundland fishermen. But while the Newfoundland fishermen do not contribute light dues, they do contribute to the taxes out of which the lighthouses have been erected and are maintained, the light dues being entirely inadequate for that purpose. The United States contribute nothing towards the erection or maintenance of these lighthouses, unless their vessels are subject to light dues, and to exempt the American fishing vessels would, in reality, confer upon American fishermen an undue preference as compared with Newfoundland fishermen, who contribute to the taxation out of which the lighthouses are maintained.

But the question under discussion is not asked with particular reference to the Newfoundland legislation now in force. The only issue raised is whether the dues referred to in the question may be imposed on the inhabitants of the United States without the consent of the United States, not whether they may be imposed without levying similar dues on British fishermen. Even if such dues can be imposed only on condition that similar dues are levied on British fishermen, the answer to the question must still be in the affirmative.

76 Canada has adopted the policy of those countries that make no charge to foreign ships in respect of expenditure upon the improvement of the facilities for coast navigation, finding sufficient recompense in reciprocal abstention. Newfoundland is not in a position to profit by the expenditure of other nations, and deems it fair, therefore, to seek contribution from those who profit by her expenditure.

Although thus at the present moment occupying different positions, both Canada and Newfoundland are alike interested in the judicial determination of the question put to the Tribunal.

CONCLUSION.

It is submitted that entry and report under the customs-laws and payment of light dues may properly be required from the inhabitants of the United States exercising their treaty rights to fish, and that in the exercise of the liberties referred to in article 1 of the treaty of 1818 they are subject, without the consent of the United States, to obligations imposed in these respects.

QUESTION FOUR.

CUSTOMS ENTRIES AND LIGHT AND HARBOUR DUES IN NON-TREATY WATERS.

Under the provision of the said article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

The point that is presented for the determination of the Tribunal under this question is whether American fishermen who enter bays or harbours for shelter, repairs, wood, or water are exempt from the obligation to pay light and harbour dues and from the obligation to enter or report at customs.

CUSTOMS ENTRY OR REPORT.

The Counter-Case of the United States appears to proceed upon the footing that inasmuch as the treaty provides that the entry into the bay or harbour is to be under such restrictions as may be necessary to prevent their taking, drying, or curing fish, or otherwise abusing the privileges reserved to them, no other restriction of any kind can attach. It is submitted that this argument is entirely fallacious, and that the mention of restrictions necessary to prevent abuse in no way excludes the imposition of those obligations which ordinarily attach to entry into bays or harbours. Indeed, the obligation to make entry or report at the customs may be highly necessary for the purpose of preventing the abuse of the privileges by using them for the purposes of smuggling. But, apart from this consideration, it is submitted that the ordinary regulations of the bay or harbour in question must attach. Such regulations, indeed, are not in the proper sense of the term restrictions upon right of entry, but are incidental to the exercise of the right.

The liability to observe reasonable regulations must exist unless there is found in the treaty something which expressly, or by neces-

sary implication, excludes it; and it is submitted that no such inference can be drawn from the terms of the treaty.

The right of British legislatures to require entry or report at customs was not derived from the treaty of 1818. It was founded upon British sovereignty; and, as has been shown in the discussion of Question No. 1, that sovereignty still remains, save so far as affected by treaty. In giving, to United States fishermen, liberty to enter bays and harbours for four purposes upon the non-treaty shore, there was no necessity for any express reservation of British sovereignty in respect of the fishermen who were to exercise the privilege. There was no such reservation in that part of the treaty respecting the treaty shore, and yet, as has been abundantly shown, United States fishermen must obey reasonable laws there, including customs-laws. For like reason, they must do the same on the non-treaty shore. And the fact that the treaty expressly states some restrictions under which they shall operate, is not a limitation of British sovereignty. It is a limitation of the liberty.

His Majesty's Government submits that the restrictions referred to in the treaty, by no means exhaust the regulations or restrictions which British legislatures may place upon the conduct of aliens coming within British jurisdiction for the four purposes specified in the treaty.

It is not contended on behalf of His Majesty's Government that entry or report would be a condition precedent to the right to go within the bay or harbour for the purposes specified, if making such entry or report would unreasonably interfere with the privileges accorded by the treaty. For instance, if the nearest custom-house where entry could be made was very distant, His Majesty's Government does not contend that the American fishing-vessels ought
79 to be taken to that custom-house, for the purpose of making entry, before taking shelter in the bay. But if such entry can be made without interfering with the privileges conferred by the treaty, as is usually the case, it is submitted that the fishermen are bound to make such entry.

The considerations which have been advanced in support of the contention made by Great Britain under the third question apply to a large extent to the present discussion, and are adopted for the purposes of this question.

It is there pointed out that, under the legislation in force in the colonies when the treaty of 1818 was entered into, vessels entering ports and harbours on the non-treaty coasts were required to enter or report at customs.

This practice has been continued since the treaty, without any objection on the part of the United States, except that made in 1886

and 1887 in connection with the seizures, or threatened seizures, for violation of the customs laws, and that made in the diplomatic correspondence between Great Britain and the United States which commenced in 1905.

In the dispute in 1886 and 1887, the United States did not take the position that colonial legislation requiring American fishing-vessels to enter or report at customs was unreasonable. The real charge made by the United States, at that time, was that the action of the Canadian customs officers was violent and hostile, not that the customs legislation was unwarranted (British Counter-Case, p. 40).

The contention that the United States made will be found in letters addressed by Mr. Bayard to Mr. Phelps of the 19th October and 6th November, 1887. The position taken by the Canadian Government is shown in an Order-in-Council (15th January, 1887), the principal part of which reads as follows (British Case, App., pp. 352, 374) :—

“The Minister further observes that the whole argument and protest of Mr. Bayard appears to proceed upon the assumption that these two vessels were subjected to unwarrantable interference, in that they were called upon to submit to the requirements of Canadian Customs Law, and that this interference was prompted by a desire to curtail or deny the privileges of resort to Canadian harbours for the purposes allowed by the Treaty of 1818. It is needless to say that this assumption is entirely incorrect.

80 “Canada has a very large extent of sea coast with numerous ports into which foreign vessels are constantly entering for purposes of trade. It becomes necessary in the interests of legitimate commerce that stringent regulations should be made by compulsory conformity to which, illicit traffic should be prevented.

“These Customs regulations, all vessels of all countries are obliged to obey, and these they do obey without in any way considering it a hardship. United States fishing vessels come directly from a foreign and not distant country, and it is not in the interests of legitimate Canadian commerce that they should be allowed access to our ports without the same strict supervision as is exercised over all other foreign vessels. Otherwise there would be no guarantee against illicit traffic of large dimensions to the injury of honest trade and the serious diminution of the Canadian revenue. United States fishing vessels are cheerfully accorded the right to enter Canadian ports for the purpose of obtaining shelter, repairs, and procuring wood and water, but in exercising this right, they are not and cannot be independent of the Customs Laws.

“They have the right to enter for the purposes set forth, but there is only one legal way in which to enter and that is by conformity to the Customs regulations.

“When Mr. Bayard asserts that Captain Forbes had as much right to be in Shelburne Harbour seeking shelter and water ‘as he would have had on the high seas carrying on under the shelter of the flag of the United States legitimate commerce,’ he is undoubtedly right, but when he declares as he in reality does, that to compel

Captain Forbes in Shelburne Harbour to conform to Canadian Customs regulations, or to punish him for their violation, is a more unwarrantable stretch of power than 'that of a seizure on the high seas of a ship unjustly suspected of being a slaver,' he makes a statement which carries with it its own refutation. Customs regulations are made by each country for the protection of its own trade and commerce, and are enforced entirely within its own territorial jurisdiction; while the seizure of a vessel upon the high seas, except under extraordinary and abnormal circumstances, is an unjustifiable interference with the free right of navigation common to all nations.

"As to Mr. Bayard's observation that by treatment such as that experienced by the 'Everitt Steele' 'the door of shelter is shut to American fishermen as a class,' the Minister expresses his belief that Mr. Bayard cannot have considered the scope of such an assertion or the inferences which might reasonably be drawn from it.

"If a United States fishing vessel enters a Canadian port for shelter, repairs or for wood and water her captain need have no difficulty in reporting her as having entered for one of these purposes and the 'Everitt Steele' would have suffered no detention had her captain on the 25th March simply reported his vessel to the
81 Collector. As it was, the vessel was detained for no longer time than was necessary to obtain the decision of the Minister of Customs, and the penalty for which it was liable was not enforced. Surely Mr. Bayard does not wish to be understood as claiming for United States fishing vessels total immunity from all Customs regulations or as intimating that if they cannot exercise their privileges unlawfully they will not exercise them at all."

A part of Mr. Bayard's argument would apply to the case of United States fishermen going on Canadian shore to obtain wood or water; but he probably had not those privileges of the treaty in mind.

The matter was made the subject of a report by Mr. Daniel Manning, the United States Secretary of the Treasury, to the Speaker of the House of Representatives dated 10th January, 1887. He characterized some colonial conduct as actuated by "unworthy and petty spite," but he fully endorsed the British view as to the reasonableness of colonial customs-laws. He said (British Case, App. p. 372):—

"The head of this department, having the responsibility of enforcing the collection of duties upon such a vast number of imported articles, under circumstances of so long a sea-coast and frontier line to be guarded against the devices of smugglers, should not be inclined to under-estimate the solicitude of the local officers of the Dominion of Canada to protect its own revenue from similar invasion. The laws for the collection of duties on imports in force in the United States and in the Dominion of Canada, respectively, will be found, on comparison, to be on many points similar in their objects and methods. They should naturally be similar, for both had, in the beginning, the same common origin. In the United States, Congress

has divided the territory of each State by metes and bounds, usually by towns, cities, or counties, into collection districts, for the purpose of collecting duties on imports, and in each collection district has established a port of entry and ports of delivery. In that manner all our sea-coast frontier is sub-divided for revenue purposes. The object of our law is to place every vessel arriving from a foreign port in the custody of a customs officer immediately upon her arrival, in order that no merchandise may be unladen therefrom without the knowledge of the Government. The Canadian law is much the same as our own in that regard, and in comparison with our own does not seem to me [to] be unnecessarily severe in its general provisions. Our own law provides, for example (sec. 2774, Rev. Stat.) that:—

“Within twenty four hours after the arrival of any vessel, from any foreign port, at any port of the United States established by law, at which an officer of the customs resides, or within any
82 harbour, inlet, or creek thereof, if the hours of the business of the office of the chief officer of customs will permit, or as soon thereafter as such hours will permit, the master shall report to such officer, and make report to the chief officer, of the arrival of the vessel; and he shall within forty-eight hours after such arrival make a further report in writing to the collector of the district, which report shall be in the form, and shall contain all the particulars required to be inserted in and verified like the manifest. Every master who shall neglect or omit to make either of such reports or declaration, or to verify any such declaration as required, or shall not fully comply with the true intent and meaning of this section, shall, for each offence be liable to a penalty of one thousand dollars.”

“Condemnation does not, in the opinion of this department, justly rest upon the Dominion of Canada because she has upon her statute-books and enforces a law similar to the foregoing, but because she refuses to permit American deep sea fishing vessels, navigating and using the ocean, to enter her ports for the ordinary purposes of trade and commerce, even though they have never attempted to fish within the territorial limits of Canada, and intend obedience to every requirement of the customs laws, and of every other law of the port which such vessels seek to enter.”

It will be seen from this extract that it was the view of the United States Secretary of the Treasury that the requirement as to entry or report at customs was reasonable, but that the attitude of Canada in refusing commercial privileges to American fishing-vessels on the non-treaty coast was subject to condemnation. But the question of commercial privileges is not material to the point now under consideration. The only question that arises here is whether the obligation to report at customs is in conflict with the treaty liberty conferred on American fishermen.

The dispute in 1905 need not be again referred to. The material portions of the correspondence are set out in this Argument under Question No. 3. The United States did not then contend that the practice was an unreasonable one, but that it was an infringement of the treaty right, whether reasonable or unreasonable. In fact, the

reasonableness of the practice was admitted, as under the *modus vivendi* then arranged it was continued.

83 It is submitted that the contention which the United States now apparently puts forward, that American fishermen may freely communicate with the shore for the purpose of obtaining wood and water, and yet refuse to report at Customs, is quite unsustainable.

Nor is there anything unreasonable in asking that vessels taking refuge in British harbours should conform to harbour regulations, and should report at the custom-house. One of the earliest Acts of the United States provided for entry at customs of storm-driven vessels. The statute of 1789 enacted (British Case, App., p. 777)—

“That if any ship or vessel compelled by distress of weather, or other sufficient cause, shall put into any port or place of the United States, other than that to which she was actually destined, the master or other person having command, shall within forty-eight hours next after his arrival, make report and deliver a true manifest of his cargo to the Collector of the port or district; and moreover shall within twenty-four hours, make protest in the usual form before a notary public or justice of the peace, of the cause and circumstances of such distress;”

It would be quite inadmissible that United States fishing vessels should remain in British harbours day after day, while taking shelter or making repairs, without reporting at the custom-house.

LIGHT AND HARBOUR DUES.

The United States Counter-Case appears to argue that express authority to impose light and harbour dues must be found in the text of the treaty now under discussion, and that liability to such light and harbour dues is excluded on the ground that it is not a “restriction” such as is mentioned in the treaty. This point has been sufficiently dealt with in discussing the obligation to make entry at customs.

In the case of light and harbour dues, it is obvious that the privileges conferred by the treaty are in no way interfered with, if it be held that the vessel is bound to pay these dues in the ordinary way.

Payment of light dues and harbour dues by American fishing-vessels dates back prior to the treaty of 1818. No diplomatic complaint upon the subject was made until 1905.

84 In 1839, James Primrose (United States consul at Pictou, Nova Scotia) (United States Case, App., pp. 442-450) made sundry objections to the amount of the light dues and to the methods of enforcing payment. But he made none to the reasonableness of some payment (British Case, App., p. 120).

In 1852, Mr. Primrose's successor at Pictou (Mr. Norton) urged upon the Government of Nova Scotia the erection of further lights as a means for saving life (British Case, App., p. 198)—

“for which benefit every vessel should contribute its share of light-duty.”

In the same year, Mr. Lorenzo Sabine wrote his elaborate report. Although violently partisan, he objected to the amount of the light dues merely, not to the reasonableness of the principle. He said (United States Case, App., p. 1276)—

“The peninsula of Nova Scotia is bounded on the northeast by the strait, or ‘gut,’ of which we are speaking, and is separated by it from the large island of Cape Breton. To save the long, difficult, and at some times of the year the dangerous voyage round this island, our vessels are in the constant practice of passing through Canso. The strait is lighted; and our flag contributes liberally to support *all* the light-houses on the coast. The “light-money” exacted is, indeed, so enormous—the benefit afforded considered—that our ship-owners complain of the exactions continually.”

In another part of his Report Mr. Sabine said that the inhabitants of two counties in Massachusetts memorialised Congress in 1806, representing (among other things) (United States Case, App., p. 1206)—

“that they were compelled to pay light-money if they passed through the Strait of Canso; that their men were imprisoned; and that if they anchored in the colonial harbors, they were compelled to pay anchorage money. Thus the complaints in 1806 were nearly identical with those in 1852.”

No diplomatic action ensued.

CONCLUSION.

It is submitted that it is permissible, in the case dealt with in this question, to require the payment of light and other dues, entry and report at custom-houses, and to impose any similar conditions.

QUESTION FIVE.

BAYS.

From where must be measured the "3 marine miles of any of the coasts, bays, creeks, or harbours" referred to in the said article?

INTRODUCTORY.

The question involves the construction to be put upon the language of the renunciation clause of the treaty of 1818 (British Case, App., p. 31):—

"And the United States hereby renounce, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above-mentioned limits: *Provided, however,* that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

The contention of His Majesty's Government is that the word "bays" includes all those tracts of water which were known under the name of bays in 1818, and were so marked in the maps of that time; and that the three marine miles must be measured from the outer limits of those waters—that is, in accordance with the general practice in such cases, from a line drawn between the headlands.

The contention of the United States is that enclosed waters are in no different position, under the clause, from the open waters adjoining the unindented coasts, and that the same restriction applies to both. In other words, they claim that American fishermen are not excluded from bays, provided that they can fish in them without approaching within three miles of any part of the shores.

LANGUAGE OF THE TREATY.

Of these two contentions the one put forward by Great Britain must prevail, if the matter is to be decided by the language of the treaty. The clause in terms excludes American fishermen from fishing within three miles of bays, and a construction which would permit them to fish anywhere in the interior of

bays would be manifestly opposed to the clear meaning of that language.

His Majesty's Government is not, as yet, aware of the reasons by which the contention of the United States is to be supported, but whatever they may prove to be, it is submitted that the Tribunal will no go behind the language of a treaty when, as in the present case, that language is distinct and is free from any ambiguity. The well-known rule of construction on this point is stated by Vattel in the following passage (Bk. 2, § 263):—

“The first general maxim of interpretation is, that *It is not allowable to interpret what has no need of interpretation*. When a deed is worded in clear and precise terms,—when its meaning is evident, and leads to no absurd conclusion,—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it. If this dangerous method be once admitted, there will be no deed which it will not render useless. However luminous each clause may be,—however clear and precise the terms in which the deed is couched,—all this will be of no avail, if it be allowed to go in quest of extraneous arguments, to prove that it is not to be understood in the sense which it naturally presents.

“Those cavillers who dispute the sense of a clear and determinate article, are accustomed to seek their frivolous subterfuges in the pretended intentions and views which they attribute to its author. It would be very often dangerous to enter with them into the discussion of those supposed views that are not pointed out in the piece itself. The following rule is better calculated to foil such cavillers, and will at once cut short all chicanery:—*If he who could and ought to have explained himself clearly and fully has not done it, it is the worse for him: he cannot be allowed to introduce subsequent restrictions which he has not expressed*. This is a maxim of the Roman law: *Pactionem obscuram vis nocere in quorum fuit potestate legem apertius conscribere*. The equity of this rule is glaringly obvious, and its necessity is not less evident. There will be no security in conventions, no stability in grants or concessions, if they may be rendered nugatory by subsequent limitations, which ought to have been originally specified in the deed, if they were in the contemplation of the contracting parties.” (§ 264.)

The Case presented on behalf of the United States is directed less to an examination of the actual provisions of the treaty than to a search for some outside consideration which may be used to defeat the plain language of it. An endeavour is, it seems, to be made
87 to set up some alleged principle of law to which the plain construction of the treaty must give way; reliance is placed on some conditions which are said to have been in existence in 1818, but of which no proof has yet been given; attention is directed to some supposed intentions of the American negotiators, and stress is laid on expressions used from time to time in the long correspondence which has passed between the parties. His Majesty's Government is confi-

dent that these contentions will find no support either in international law or in the facts of this particular case. But it is respectfully submitted that the office of this Tribunal is to construe the treaty as it stands, and not to read into it qualifications and stipulations which were not inserted by those who framed it. (United States Counter-Case, p. 69.)

WORDING OF THE TREATY.

Turning first to the actual wording of the treaty it is to be observed that the words "bays, creeks, or harbours" are used generally. There is no limitation or qualification. They include, therefore, in their natural sense all the bays, creeks, or harbours on the coasts in question. It has been shown in the British Case that the negotiators of the treaties of 1783 had before them a map of these coasts published by one Mitchell in 1755, and that there were maps by Jeffreys also available at the time. Some of these maps have been reproduced, and copies form part of the Appendix to the British Case. The numerous bays and other indentations of the coasts were clearly shown on them. The negotiators of the treaty of 1818 were well aware of the existence of these bays. It cannot be supposed that they would have failed to insert some express limitation, if their intention had been to confine the renunciation clause to bays of a certain size only.

The word "bays" is not a term of jurisprudence. It has no legal significance. It is a term used in geography to describe tracts of water between headlands, and it is used of those waters irrespective of their extent.

A further reason for believing that the negotiators of the treaty intended to use the word "bays" with cartography reference
88 is to be found in observation of its use in other parts of the article of the treaty.

It must necessarily have the same meaning throughout the article, and a comparison of the various passages in which it occurs shows that it could not have been used throughout in the limited sense contended for by the United States.

EFFECT OF UNITED STATES CONTENTION.

The contention of the United States that the distance of three marine miles must be measured from low water mark following the indentations of the coast, is inconsistent with the language of the treaty. It is open to the obvious and insuperable objection that it gives no effect whatever to the words "bays creeks or harbours." According to this contention, the area renounced is to be measured in the same way from the shores of enclosed waters as from the

unindented shores, and in that view the clause would have precisely the same effect if the word "coasts" had stood alone, and the words "bays creeks or harbours" had been altogether omitted. This objection was pointed out by Lord Aberdeen in his correspondence with Mr. Everett so long ago as 1844, and no answer has ever yet been made to it. It is submitted that the treaty should be construed so as to give effect to these words. (United States Case, p. 248.)

But there are further objections:—

First: The renunciation is of any liberty (British Case, App., p. 31)—

"on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above-mentioned limits:"

It cannot be argued that United States fishermen were prohibited from fishing "within three marine miles" of a bay, and yet that they were to be at liberty to fish in the bay itself. If they could not go "within" a certain distance of the bay, they could not go within the bay itself.

The preposition "on," moreover, was no doubt intended to provide specifically for this very point. United States fishermen were not to fish "on" the bays, or within three miles of them.

It appears, therefore, to be quite clear that the renunciation of the treaty included the bays as well as three miles from the bays. For not only is the exclusion specifically applied to the bays, but it prohibits approach within three miles of the bays.

And if so, it is quite impossible to contend that three miles from the bays meant three miles from the shore of the bays. That distance would exclude the central part of the bay, which, according to the language of the treaty, was included. Indeed, the curious result would follow that three miles from a bay would mean three miles from the shore into the bay.

If the United States contention were correct, the words "or within three marine miles from the bays" would have a limiting instead of an enlarging effect upon the word "on." For a renunciation of liberty to take fish "on" a bay would certainly include the whole of the bay; whereas it is said that the addition of the words "or within three marine miles" of the bay would cut down the renunciation to a strip around the shore of the bay.

Secondly, it will not be contended that United States fishermen were to have liberty to fish in "harbours" on the non-treaty coasts. And it can hardly be disputed that the three miles were to count

from the entrance of the harbours and not from their shores. But if so, how can a distinction in that respect be drawn between bays and harbours? They are in the same sentence, in the same category, and governed by the same prepositions.

Thirdly, the renunciation of liberty to fish on or within three miles of the bays was accompanied by the proviso (British Case, App., p. 31)—

“that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter” &c.

But if the intention had been that American fishermen were to be at liberty to enter the larger bays in order to fish (keeping three miles from the shore), the proviso would not have given them liberty to enter such bays for shelter. It would have given liberty to go within the three miles.

Fourthly, if the language of the treaty were properly expanded so as to make the distance prescribed directly applicable to each of the places mentioned, it would read thus:—

“three marine miles of any of the coasts; three marine miles of any of the bays; three marine miles of any of the creeks; or three marine miles of any of the harbors.”

The interpretation of the United States would require it to be read as follows:—

90 “Three marine miles of any of the coasts; three marine miles of any of the coasts of the bays; three marine miles of any of the coasts of the creeks; or three marine miles of any of the coasts of the harbors.”

JUDICIAL DECISION AS TO CONSTRUCTION OF THE TERM “BAYS.”

This very question has been the subject of consideration by the Judicial Committee of His Majesty's Privy Council, in the case to which reference has already been made in the British Case, and it was expressly decided, after argument, that the convention of 1818 applied to all bays whatever, large or small. Lord Blackburn, in giving the reasons of the Committee said that it was impossible to have any doubt on this point (*The Direct United States Cable Co. v. the Anglo-American Telegraph Co.*, L. R. 2 App. Cases, p. 394. British Case, p. 106).

USE OF THE TERM “BAYS” IN OTHER TREATIES.

The word “bays” occurred in other treaties prior to that of 1783, and it is pertinent to observe that the very limited meaning suggested by the United States can not be given to it in any of these documents.

In 1686, a treaty was entered into between Great Britain and France, by which it was agreed that (British Case App., p. 6)—

“the King of Great Britain’s subjects shall not drive their commerce and trade, nor fish in the havens, bays, creeks, roads, shoals or places, which the most Christian King holds or shall hereafter hold in America; and in like manner, the most Christian King’s subjects shall not drive their commerce and trade, nor fish in the havens, bays, creeks, roads, shoals or places, which the King of Great Britain possesses or shall hereafter possess in America.”

No one can suppose that the parties to this treaty intended to confine the word “bays” to sheets of water not more than 6 miles wide. No valid distinction can be suggested between Chesapeake Bay and the bays in question in the present case.

In the treaty of 1763, between Great Britain, France, and Spain, there is the following (British Case, App., p. 8):—

“His Britannic Majesty consents to leave to the subjects of the Most Christian King the liberty of fishing in the Gulf of St. Lawrence, on condition,” &c.

This treaty recognised that, by her acquisition of all territory surrounding it, Great Britain acquired dominion over the whole of the Gulf of St. Lawrence. Great Britain “consents,” therefore, that French fishermen shall have liberty of fishing in the Gulf.

91 A most pertinent treaty is that of 1778 between France and the United States (United States Case, App., p. 92):—

“The Most Christian King’s subjects shall not fish in the havens, bays, creeks, roads, coasts or places which the said United States hold or shall hereafter hold; and in like manner the subjects, people and inhabitants of the said United States shall not fish in the havens, bays, creeks, roads, coasts or places which the Most Christian King possesses or shall hereafter possess;”

It will be observed that both this clause and the clause in the treaty of 1818 are prohibitions of fishing in bays. In the United States-French treaty, France agreed that her people should not fish in United States bays. In the United Kingdom-United States treaty, the United States renounced all right to fish in British bays. The cases are in that respect identical. And it is, therefore, most pertinent to ask whether French fishermen had a right to fish in Chesapeake Bay, Delaware Bay, the harbour of New York, and the other United States bays, whose headlands are more than 6 miles apart. If they had not, it was because those waters are “bays,” within the meaning of the treaty of 1778. And, if so, the United States can hardly argue that the word was used with different meaning, five years afterwards, in the United Kingdom-United States treaty of 1783.

In the treaty of 1794, between Great Britain and the United States, there was the following clause (British Case, App., p. 23) :—

“Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within cannon shot of the coast, nor in any of the bays, ports, or rivers of their territories, by ships of war or others having commission from any Prince, Republic, or State whatever. But, in case it should so happen, the party whose territorial rights shall thus have been violated shall use his utmost endeavours to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.”

It was clearly intended that the word “bays” in this treaty should apply to all the bays on the United States coast, although wider than six miles. Clearly it was intended to include Delaware Bay
92 (with headlands of $10\frac{1}{2}$ miles) for in the year immediately preceding the treaty (1793), the United States had maintained (in the case of the “Grange”) the territoriality of the waters of that bay.

BAYS “OF HIS MAJESTY’S DOMINIONS IN AMERICA.”

It has been suggested that the natural meaning of the term “bays” may be limited by the words which follow, namely, “Of His Britannic Majesty’s dominions in America.” Great Britain contends that these words are merely descriptive of the locality of the bays, and that they have no other significance. In the Counter-Case of the United States the attitude of Great Britain on this point has been misunderstood. It is there stated that “the British Case is based on the assumption that the words ‘bays, creeks, or harbours of His Britannic Majesty’s Dominions in America,’ as used in the renunciatory clause of the treaty, were intended to be descriptive of territorial waters of Great Britain,” and an argument is thereupon formulated on that issue. This is a misapprehension. The contention of His Majesty’s Government is stated quite clearly in the British Case, and has been stated in the same way on many occasions during the last seventy years. It is that the treaty relates to all bays on the British coasts. In that view no question can arise as to territorial jurisdiction: the words of the article are read in their natural sense as referring to all the tracts of water known as bays on the coasts of the British dominions in North America. It is abundantly clear that all the bays on these coasts were within British jurisdiction, but, in the view that His Majesty’s Government presents, the question is not material. (United States Counter-Case, p. 69.)

That the words “of His Britannic Majesty’s dominions in America” were merely descriptive from a geographical point of view is clear from an examination of the treaty. It will be observed that

the language of the renunciation of 1818 follows closely the language of the grant of 1783 (British Case, App., p. 13),

“on the Coasts, Bays, and Creeks of all other of His Britannic Majesty’s Dominions in America;”

The word “bays” was therefore undoubtedly intended to be
93 used with the same significance in both treaties. And consideration of the language of both documents shows clearly that the words “of all other of His Britannic Majesty’s Dominions in America” were employed as words of locality, and not of ownership. The words were used as a geographical limitation; they were merely a convenient form of denoting the bays on those parts of the British coasts which were not referred to by name. It would be difficult to suggest any other form of words which would so completely give effect to the construction for which His Majesty’s Government contends. On the other hand, if it had been intended to limit the waters in the manner suggested by the United States, it would certainly have been necessary, in view of the great uncertainty of the law on the point, and the large claims which both Great Britain and the United States were maintaining at that time, to come to some express agreement on the extent of territorial jurisdiction over enclosed waters, and to give effect to that agreement in the treaty.

CONTENTION OF THE UNITED STATES AS TO 6-MILE LIMIT OF TERRITORIAL JURISDICTION.

The suggestion that the treaty is limited to territorial bays originated not with Great Britain but with the United States. The argument of the United States on former occasions has been that the article refers only to bays over which Great Britain had jurisdiction in 1818, and that according to international law no nation in 1818 could have jurisdiction over bays more than six miles in width. That was the contention put forward by the United States at the time of the Halifax Commission in 1877. It was adopted and renewed by the Committee of the United States Senate in 1887.

It cannot possibly be urged before this Tribunal that the state of international law was, in 1783, or in 1818, such as to render every bay in British North America, wider than six miles, open ocean (British Case, pp. 160, 107).

But if that contention be put forward, it is sufficiently met by the argument set out at pages 106 to 122 of the British Case, to which the attention of the Tribunal is respectfully directed. The existence of any such rule is absolutely negatived by the usage of nations and the opinions of jurists. It is not thought necessary to repeat in this place the detailed statement which has been already presented, on

94 this point, but it may be convenient to recall the practice of the two parties to the treaty on the question of jurisdiction over enclosed waters.

PRACTICE OF THE UNITED STATES AS TO ENCLOSED WATERS.

It is certain that neither at the time of the treaty, nor at any time since, would Great Britain or the United States have admitted the existence of any such limitation as that which is now contended for by the United States (British Counter-Case, App., pp. 18, 19, 20, 23, 29).

So far back as the years 1779–82 the Congress of the United States passed resolutions and gave instructions, with reference to the negotiations which were to be carried on by the commissioners, which resulted in the treaty of 1783. These resolutions and instructions are important as showing the opinion prevalent at that time on the point. Reference may be made particularly to the following portion of the instructions issued in 1779 to the commissioners (British Counter-Case, App., p. 23):—

“ You are therefore not to consent to any Treaty of Commerce with Great Britain without an explicit stipulation on her part not to molest or disturb the Inhabitants of the United States of America in taking fish on the Banks of Newfoundland, and other fisheries in the American Seas any where, excepting within the distance of three leagues of the Shores of the Territory remaining to Great Britain at the close of the war, if a nearer distance cannot be obtained by negotiation—and in the negotiation you are to exert your most strenuous endeavours to obtain a nearer distance in the Gulf of St. Lawrence, and particularly along the shores of Nova Scotia. As to which latter we are desirous, that even the Shores may be occasionally used for the purpose of carrying on the Fisheries by the Inhabitants of these States.”

This shows that, in 1779, Congress was prepared to concede the exclusive right of the British Government to the extent of three leagues from the shore.


In 1793, France seized a British vessel, the “ Grange,” in Delaware Bay, more than 3 miles from land. This bay has a width between its headlands of $10\frac{1}{2}$ miles, and it extends in length about 30 miles before the distance between its shores diminishes to 6 miles. The United States demanded the release of the vessel on the ground that the seizure had been made in neutral waters, because Delaware Bay was United States territory. Chancellor Kent, in his “ Com-
95 mentaries ” (9th Ed., Vol. I, p. 32), refers to this incident in the following terms:—

“ The executive authority of this country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction; and it rested its claim upon those authorities which admit that gulfs,

channels, and arms of the sea, belong to the people with whose lands they are encompassed. It was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea beyond the reach of cannon-shot."

The French Government complied with the demand of the United States. Since that time the United States have continuously treated Delaware Bay as their territory, and have prescribed regulations for fishing which apply to the whole of the bay.

In 1804, the question of the extent of territorial waters became important in connection with the British assertion of the right of search for British seamen, in United States ships, on the high seas. During the discussion Mr. Jefferson (the President of the United States) wrote to the United States Secretary of State (8th September) defining the position of the United States in respect of bays as follows (British Case, App., p. 59) :—

"As we shall have to lay before Congress the proceedings of the British vessels at New York, it will be necessary for us to say to them with certainty which specific aggressions were committed within the common law, which within the admiralty jurisdiction, and which on the high seas. The rule of the common law is that wherever you can see from land to land, all the water within the line of sight is in the body of the adjacent country and within common law jurisdiction. Thus, if in this curvature  you can see from *a* to *b*, all the water within the line of sight is within common law jurisdiction, and a murder committed at *c* is to be tried as at common law. Our coast is generally visible, I believe, by the time you get within about twenty-five miles. I suppose that at New York you must be some miles out of the Hook before the opposite shores recede twenty-five miles from each other. The three miles of maritime jurisdiction is always to be counted from this line of sight."

Commenting in its Counter-Case upon the reference to this letter in the British Case, the United States say ("United States Counter-Case, p. 71) :—

"The British Case omits to state, however, that the position taken by Great Britain at that time was that three marine miles
96 from shore was the limit of maritime jurisdiction, and could not be extended by one nation beyond that distance from its shores so as to affect the rights of another nation, without the consent or acquiescence of that nation."

But Mr. Jefferson's letter was dealing with the subject of the width of territorial bays and the headland theory, while the comment of the United States Counter-Case refers to jurisdiction upon undented coasts. The comment, therefore, is without point.

In 1806, during the negotiations with reference to freedom of United States vessels from British seizure, an attempt was made to fix by agreement the limit of United States jurisdiction upon its

coasts; and the United States, suggesting that a fair distance would be as far out as (British Case, App., p. 60)—

“the well defined path of the Gulf Stream,”

asked that the following might be agreed to:—

“It is agreed that all armed vessels belonging to either of the parties engaged in war, shall be effectually restrained by positive orders, and penal provisions, from seizing, searching, or otherwise interrupting or disturbing vessels to whomsoever belonging, whether outward or inward bound, within the harbours or the chambers formed by headlands, or anywhere at sea, within the distance of four leagues from the shore, or from a right line from one headland to another;”

Here we find the United States themselves putting forward the principle of a headland line and asserting that their jurisdiction should extend to a distance of twelve marine miles from that line.

After negotiation, the limit was fixed at 5 marine miles from the shore, but the convention never became effective, and it is therefore clear that the United States did not at that time claim that the jurisdiction of Great Britain over her territorial waters was limited to the extent that is now suggested.

In 1846, by the treaty of Washington made between Great Britain and the United States, it was stipulated that the boundary between the United States and British North America should follow the 49th parallel of latitude (British Case, App., p. 33)

“to the middle of the channel which separates the continent from Vancouver’s Island; and thence southerly through the middle of the said channel, and of Fuca’s Straits, to the Pacific Ocean;”

Disputes involving the title to various islands having arisen, 97 the boundary question at issue between the two nations was submitted to the arbitration of the German Emperor, and in 1873 a protocol was signed at Washington for the purpose of marking out the frontier in accordance with his arbitral decision. By this decision the boundary, after passing the islands which had given rise to dispute, is carried across a space of water 35 miles long by 20 miles broad, and is then continued for 50 miles down the middle of a strait 15 miles broad, until it touches the Pacific Ocean midway between Bonilla Point on Vancouver’s Island and Tatooch Island lighthouse on the United States shore, the waterway being there 10½ miles in width. The United States in this case, therefore, continue to claim as territorial their share of the waters of a strait which is much more than 6 miles in width, and recognise the right of Great Britain to the other moiety.

In 1885, it was held by the United States Court of Commissioners of “Alabama” Claims, that Chesapeake Bay was United States territory, and that seizures made by the Confederate cruisers within

any part of Chesapeake Bay were not made on the high seas. The headlands of Chesapeake Bay are 12 miles apart, and its length is over 114 miles before its waters narrow to 6 miles. The fishing in this bay is controlled by State legislation.

In 1892-3, in the printed *Argument of the United States in the Behring Sea Arbitration Case*, there is the following statement (*British Case*, App., p. 486, 487) :—

“Precisely what is the limit of jurisdiction upon the littoral sea, and precisely what are the nature and extent of the jurisdiction that can be asserted within it, whether it is absolute or qualified, territorial or extraterritorial, are questions that have been a subject of grave difference of opinion among jurists. Nor have they ever been entirely settled. They will be found to be discussed with a fullness of learning, a depth of research, and a masterly power of reasoning, to which nothing can be added, in the opinions of the English judges in the important and leading case of the *Queen v. Kehn* (2 Law Rep. Exch. Div., 1876-77, pp. 63 to 239). These learned and eminent judges were not fortunate enough to agree upon all the questions involved, and every view that can be taken of them, and every consideration that is pertinent, are exhaustively presented in their opinions.”

* * * * *

“It is under the operation of the same principle on which jurisdiction is awarded to nations over the sea within the 3-mile or cannon-shot limit, that a similar jurisdiction is allowed to be
98 exercised not only over navigable rivers, bays, and estuaries, which may be fairly regarded as lying within territorial boundaries, but over those larger portions of the ocean comprised within lines drawn between distant promontories or headlands, and often extending much more than three miles from the nearest coast. Such waters were formerly known in English law as ‘the King’s Chambers.’”

In 1903, in the *Alaskan Boundary Arbitration Case*, the United States asserted that its boundary extended three miles beyond a line joining the islands which lie off the Alaska coasts. Some of the distances between these islands are more than twenty-five miles.

PRACTICE OF GREAT BRITAIN.

Great Britain, for her part, at the time the treaty of 1818 was made, was asserting sovereignty not only over enclosed waters, but over open seas surrounding her coasts to a wide extent. It is true that, at the beginning of the 19th century, she was not insisting on her claim to sovereignty over the four seas with the same vigour as she had done at an earlier period, but so late as 1803 the negotiations with the United States for a settlement of the right of search had been broken off because the English Government would not concede freedom from search within the British seas, and so late as 1805 the British Admiralty regulations contained an order that His Majesty’s

ships should insist on foreign ships striking their top-sails, and taking in their flags, in acknowledgment of His Majesty's sovereignty in his seas, which extended to Cape Finisterre. In 1818, claims to British sovereignty over St. George's Channel and the King's Chambers, which include the waters within lines drawn from headland to headland as from Orfordness to the Foreland and from Beachy Head to Dunnose Point, were admitted without dispute. De Martens states that nobody in his time (1821) contested the exclusive right of Great Britain over St. George's Channel. It was insisted to the full in 1818, and was admitted by Chancellor Kent to be a proper claim.

By the common law of England, all enclosed waters are within the realm. Thus the Bristol Channel was decided by the Court of Queen's Bench in 1859 to be within the counties which bound it.

(*Rex v. Cunningham*, Bell's Crown Cases, p. 72.) This case 99 is the leading English authority on the point, and it was accepted as good law by the Privy Council in 1877. The Court stated in their judgment, which was delivered by Chief Justice Cockburn, that they proceeded on the principle that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties, by the shores of which its several parts are respectively bounded.

It is clear, therefore, that by the common law of England, enclosed waters on the coasts of the British dominions are within the sovereignty of the British Crown.

Turning to the particular shores now in question, it may be convenient to cite from the argument of Mr. Dwight Foster, in the Halifax Arbitration, the following passage, showing his views as to the wide extent of the claim made by Great Britain at the time of the treaty. Speaking as counsel for the United States, he said as follows (*British Counter-Case*, App., p. 183):—

“Early in the diplomatic history of this case we find that the Treaty of Paris in 1763 excluded French fishermen three leagues from the coast belonging to Great Britain in the Gulf of St. Lawrence and fifteen leagues from the island of Cape Breton. We find that the treaty with Spain in the same year contained a relinquishment of all Spanish fishing rights in the neighborhood of Newfoundland. The Crown of Spain expressly desisted from all pretensions to the right of fishing in the neighborhood of Newfoundland. Those are the two treaties of 1763—the Treaty of Paris with France and the treaty with Spain. Obviously, at that time, Great Britain claimed for herself exclusive sovereignty over the whole Gulf of St. Lawrence and over a large part of the adjacent seas. By the Treaty of Versailles, in 1783, substantially the same provisions of exclusion were made with reference to the French fishermen. Now, in that broad claim of jurisdiction over the adjacent seas, and the right asserted and maintained to have British subjects fish there exclusively, the fishermen of New England, as British subjects, shared.

Undoubtedly, the pretensions that were yielded to by those treaties have long since disappeared. Nobody believes now that Great Britain has any exclusive jurisdiction over the Gulf of St. Lawrence or the Banks of Newfoundland, but at the time when the United States asserted their independence and when the treaty was formed between the United States and Great Britain, such were the claims of England, and those claims had been acquiesced in by France and by Spain. That explains the reason why it was that the elder Adams said he would rather cut off his right hand than give up the fisheries at the time the treaty was formed, in 1783, and that explains the reason why, when his son, John Quincy Adams, was one of the 100 Commissioners who negotiated the Treaty of Ghent, at the end of the war of 1812, he insisted so strenuously that nothing should be done to give away the rights of the citizens of the United States in these ocean fisheries. Those are the fisheries which existed in that day, and those alone. The mackerel fishery was unknown. It was the cod-fishery and the whale-fishery that called forth the eulogy of Burke over a hundred years ago. It was the cod-fishery and the whale-fishery for which the first and second Adams so strenuously contended; and, inasmuch as it was found impossible in the treaty at the end of the war of 1812 to come to any adjustment of the fishery question, all mention of it was omitted in the treaty. The treaty was made leaving each party to assert his claims at some future time. And so it stood; Great Britain having given notice that she did not intend to renew the rights and privileges conceded to the United States in the Treaty of 1783, and the United States giving notice that they regarded the privileges of the Treaty of 1783 as of a permanent character, and not terminated by the war of 1812; but no conclusion was arrived at between the parties. What followed? The best account of the controversy to be found is in a book called 'The Fisheries and the Mississippi,' which contains John Quincy Adams's letters on the subject of the Treaty of Ghent and the convention of 1818.

"Mr. Adams in that book says that the year after peace was declared, British cruisers warned all American fishing-vessels not to approach within sixty miles from the coast of Newfoundland, and that it was in consequence of this that the negotiations were begun which led to the Convention of 1818; and the Convention of 1818, in the opinion of Mr. Adams, conceded to the United States all that they desired. He believed and asserted that Great Britain had claimed, and intended to claim, exclusive jurisdiction over the Gulf of St. Lawrence and over the Banks of Newfoundland, and he considered and stated that the Treaty of 1818, in setting at rest for ever those pretensions, obtained for the United States substantially what they desired."

Great Britain has continuously exercised exclusive jurisdiction over the bays on these shores. It is important to note in this connection that immediately after the making of the treaty, Great Britain passed the statute 59 Geo. III, cap. 38, by which it was made an offence for any person, after requisition by the Governor, to refuse to depart from any of the bays, creeks, or harbours on the non-treaty shore. Referring to this statute, the Judicial Committee of the

Privy Council said, in the Conception Bay case, to which reference has already been made:—

“It enacts not merely that subjects of the *United States* shall observe the restrictions agreed on by the Convention, but that all persons, not being natural-born subjects of the King of *Great Britain* shall observe them under penalties. And in particular, 101 by sec. 4, it enacts that if ‘any person’ upon being required by the governor, or any officer acting under such governor, in the execution of any order or instructions from His Majesty in Council, shall *inter alia* refuse to depart from such bays, he shall be subject to a penalty of £200.

“No stronger assertion of exclusive dominion over these bays could well be framed. As has been already observed, *Conception Bay* is in every sense of the words a bay within *Newfoundland*, though of considerable width; and as there is nothing to justify a construction of the Act limiting it to bays not exceeding any particular width, this is an unequivocal assertion of the British Legislature of exclusive dominion over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of *Great Britain*.” (Direct United States Cable Co. v. Anglo-American Telegraph Co., L. R. 2, App. Cases, p. 421.)

BAY OF CHALEURS.

That the Bay of Chaleurs was always assumed to be British may be seen by the following:—

In 1788, a statute of Lower Canada (28 Geo. III, cap. 6) gave jurisdiction to Justices of the Peace, in cases of differences between masters of fishing-ships, &c., in the Bay of Chaleurs. (British Case, App., p. 592.)

In 1807, a statute of Lower Canada (47 Geo. III, cap. 12) referred to Mackerel Point as “in the Bay of Chaleurs.” (British Case, App., p. 602.)

In 1824, a statute of Lower Canada (4 Geo. IV, cap. 1), spoke of Mackerel Point as “at the entrance” of the Bay of Chaleurs; and the statute provided that exportations of fish from places west of that point should be marked “Baie des Chaleurs,” and that exportations from places east of it should be marked “Gaspé.” (British Case, App., p. 609.)

Evidence of the general understanding on this subject is supplied by the fact that the American writer Mr. Theodore Lyman, in his book “Diplomacy of the United States,” written in 1828, recognised that the bay had been conceded by the treaty of 1818. (British Case, p. 87.)

Until about the year 1836, United States fishermen did not attempt to fish in the bay, for it was not until about that time that the change

in the mackerel fishing rendered access to it of any importance. In 1852 Commander Campbell, reporting to the British Vice-Admiral (Seymour) on American encroachments, said (15th August, 1852):—

“I hear from the people of the country that for years after 102 the Treaty of 1818, was ratified, the Americans never did attempt to fish in any part of Chaleur Bay, and that they have only done so within the last 12 or 15 years—or since the mackerel fishery has been followed by them with so much advantage—The obvious inference then is that it was not till long after the Treaty of 1818 was concluded, that the fishing in the Bay of Chaleur was valued by them, consequently no exception, as regards the word ‘bays,’ seems to have been thought of, & none would ever have been thought of had not the lucrative mackerel fishery become known.” (British Case, App., p. 190.)

In 1851, the British parliament passed a statute (14 & 15 Vict., cap. 63) establishing as the boundary between the Provinces of Canada and New Brunswick, a line (British Case, App., p. 572)—

“down the centre of the stream of the *Restigouche* to its Mouth in the Bay of *Chaleurs*; and thence through the middle of that Bay to the Gulf of the *Saint Lawrence*;

In 1880, the Supreme Court of Canada in the case of *Mowat v. McFee* (5 Supreme Court Reports, p. 66) decided that the Bay of Chaleurs was all within Canadian territory.

In 1888, the unratified treaty between Great Britain and the United States conceded the Bay of Chaleurs to Great Britain, the line being drawn from the Light at Birch Point, or Miscou Island, to Macquereau Point Light. (British Case, App., p. 42.)

MIRAMICHI BAY.

The legislature of New Brunswick has always assumed that the Bay of Miramichi was entirely within its jurisdiction.

In 1799, (39 Geo. III, c. 5) the legislature enacted minute regulations regarding fishing operations in the bay. (British Case, App., p. 597.)

In 1810, (50 Geo. III, c. 5) the legislature provided for the erection of beacons or buoys in the bay and its harbours, and imposed a duty of one halfpenny per ton on all vessels (except coasters) entering the bay and harbours. (British Case, App., p. 603.)

In 1823, (4 Geo. IV, c. 23) the legislature amended the statute of 1799; and in 1829 (9 & 10 Geo. IV, c. 3) and 1834 (4 Wm. IV, c. 31) the operation of both of those statutes was continued. (British Case, App., pp. 607, 609, 612.)

In 1888, the unratified treaty between Great Britain and the United States conceded the Canadian right to the bay. (British Case, App., p. 42.)

Other bays were conceded by the 1888 unconfirmed treaty.

PRACTICE OF OTHER NATIONS.

The practice of other nations has been summarised in the
 103 British Case, and the Tribunal is respectfully referred to the
 statement presented there at pages 114 and 115. It is sufficient
 in this place to recall that, by the convention of 1839 between Great
 Britain and France, it was stipulated that—

“It is equally agreed that the distance of three miles fixed as the
 general limit for the exclusive right of fishery upon the coasts of
 the two countries, shall, with respect to Bays the mouths of which
 do not exceed ten miles in width, be measured from a straight line
 drawn from Headland to Headland.” (British Case, App., p. 32.)

And that the convention of 1882 between Great Britain, Germany,
 Belgium, Denmark, France, and the Netherlands, stipulated for
 exclusion of aliens from a distance of three miles from national
 shores, and added—

“Pour les baies, le rayon de 3 milles sera mesuré à partir d’une
 ligne droite, tirée en travers de la baie, dans la partie la plus rappro-
 chée de l’entrée, au premier point où l’ouverture n’excèdera pas
 10 milles.” (British Case, App., p. 42.)

These conventions fix, by agreement, a particular limit of ten miles
 to the bays which are to be treated as territorial on the coasts to
 which they referred, but they are conclusive to show that apart from
 particular agreement there is no general limitation of six miles, or,
 indeed, any general limitation at all. The conventions are in fact a
 limitation, by agreement, of the rights over enclosed waters which
 would otherwise be recognised. It will be observed that six Euro-
 pean Powers were parties to this convention of 1882.

BEHRING SEA ARBITRATION.

At the opening of the proceedings of the Behring Sea Arbitration,
 Mr. Gram, the Arbitrator designated by Sweden and Norway, read
 a statement in which he said:—

“The peculiarity of the Norwegian Law quoted by the Counsel
 for the United States consists in its providing for a close season for
 the whaling. As to its stipulations about inner and territorial waters,
 such stipulations are simply applications to a special case of the
 general principles laid down in the Norwegian Legislation concern-
 ing the gulfs and the waters washing the coasts. A glance on the
 map will be sufficient to show the great number of gulfs or fiords
 and their importance for the inhabitants of Norway. Some of these
 fiords have a considerable development, stretching themselves far
 into the country and being at their mouth very wide. Never-
 104 theless, they have been from time immemorial considered as
 inner waters, and this principle has always been maintained,
 even as against foreign subjects. (British Case, App., p. 484.)

“More than twenty years ago a foreign government once com-
 plained that a vessel of their nationality had been prevented from

fishing in one of the largest fiords of Norway, in the northern part of the country. The fishing carried on in that neighbourhood during the first four months of every year is of extraordinary importance to the country, some 30,000 people gathering there from south and north, in order to earn their living. A government inspection controls the fishing going on in the waters of the fiord, sheltered by a range of islands against the violence of the sea. The appearance in these waters of a foreign vessel pretending to take its share of the fishing was an unheard of occurrence, and in the ensuing diplomatic correspondence the exclusive right of Norwegian subjects to this industry was energetically insisted upon as founded in immemorial practice.

"Besides, Norway and Sweden have never recognized the three mile limit as the confines of their territorial waters. They have neither concluded nor acceded to any treaty consecrating that rule. By their municipal laws the limit has generally been fixed at one geographical mile, or one fifteenth part of a degree of latitude, or four marine miles, no narrower limits having ever been adopted. In fact, in regard to this question of the fishing rights, so important to both of the United Kingdoms, the said limits have in many instances been found to be even too narrow."

HEADLANDS LINE.

The practice of fixing the outer limit of enclosed waters by a line drawn between the headlands has been sometimes referred to by the advocates of the United States as if it were a new theory propounded for the first time by Great Britain. This of course, is not so. Azuni states that this practice had been generally adopted by nations so long ago as 1796. Writing in that year, he said:—

"It is already established among polished nations that, in places where the land, by its curve, forms a bay or a gulf, we must suppose a line to be drawn from one point of the enclosing land to the other, or along the small islands which extend beyond the headlands of the bay, and that the whole of this bay, or gulf, is to be considered as territorial sea, even though the centre may be, in some places, at a greater distance than 3 miles from either shore."—"The Maritime Laws of Europe," American edition, 1806, pt. 1, cap. 2, sec. 17.)

105 It is, and has always been, the general practice recognised by the usage of nations in the case of enclosed waters. Once it be decided that American fishermen have no right in the tracts of water known as bays on the coasts in question, then it follows that the three marine miles must be measured from a line drawn between the headlands.

It is unnecessary to refer the Tribunal to the numerous instances in which this rule has been accepted. They are within the knowledge of the Arbitrators, and fishery conventions in which this principle has been expressly recognised have already been cited. It is enough to refer to the convention of 1839 between France and Great Britain;

the agreement of 1874 between Great Britain and Germany; the action of the Danish Government in 1880; the North Sea Convention of 1882; and the action of France in 1888 referred to in the British Case at pages 114 and 115. His Majesty's Government does not anticipate that this point will be seriously contested; the same principle was adopted by the United States as long ago as 1806, and was formally admitted by them in the Alaska Arbitration in 1903. (British Case, App., p. 62.)

The printed Argument of the United States in that case contained the following (British Case, App., p. 489):—

“It thus appears that from *the outer coast line* of a maritime state, as defined in physical geography, is invariably measured under international law, the limit of that zone of territorial water generally known as the marine league. The boundary of Alaska,—that is, the exterior boundary from which the marine league is measured,—runs along the outer edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands. When “measured in a straight line from headland to headland” at their entrances, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. That fact, according to the authorities quoted in the British Counter Case, pp. 24–28, place them within the category of territorial waters. All of the interior waters touching upon the *lisière*, such as Behm Canal, Taku Inlet and Lynn Canal are, in the language of Hall, “lakes enclosed within the territory,” and as such are territorial waters, regardless of their width at their entrances when measured from headland to headland.

“Distinction between the coast line of physical geography for the purposes of boundary, and the political coast line, for the purposes of jurisdiction.”

“Physical geography simply reproduces the actual coast lines of maritime states, as they are defined by nature at the point of
106 contact of the sea with the land. The following description of the coast of Maine, from an eminent geographical authority, may be taken as an apt illustration:

“On the Atlantic coast Maine presents an uninterrupted succession of peninsulas, islands, and bays; and all these bays are the mouths of rivers—outlets of valleys having their origin far in the interior. Nothing similar is seen on all the territory of the Union. One must come to Norway or go to the extreme point of South America to find so long a part of the coast—400 kilometers in a straight line from the southwest to the northeast—so deeply cut up that we measure on it more than 4,000 kilometers of contact with the deep sea. All these bays of Maine are also fiords, but spacious, and which in spite of their equally rocky banks, of comparatively little elevation, receive the morning and afternoon sun, as well as that of noon, and open to mariners more ports, more anchorages and safe shelters than all the other coasts upon the three seas of the Union.’

"It thus appears that the actual coast line of Maine, as known to physical geography, following as it must the sinuosities defined by the contact of the sea with the land, is about 4,000 kilometers, while the political coast line superimposed upon it by operation of international law, is vastly shorter by reason of the fact that the artificial and imaginary line cuts across the heads of bays and inlets. The natural coast line, as known to physical geography, exists primarily for the purposes of boundary. The artificial coast line, as known to international law, exists only for the purposes of jurisdiction. That obvious distinction is well illustrated by Rivier in his *Principes du Droit des Gens*. Speaking of '*La mer littorale*,' he says: 'The name territorial sea is applied to all the seas or portions of the sea which belong to the territory: to the littoral sea, to the interior sea, in the various acceptations of this word, to gulfs and straits. It is the general and juridical term (*le terme général et juridique*), while the others are rather physical or geographical (*physiques ou géographiques*). The term littoral sea has the advantage of a special meaning. They say also jurisdictional sea, after one of the elements of the juridical situation of that part of the sea.

"The principle that the littoral sea forms a part of the territory is justified by the necessities of the preservation and security of the state, from the point of view, military, sanitary, fiscal, as well as the point of view of the interests of industry, specially of the right of fishing. The result is, for the coast and for *terra firma*, the littoral sea has the character of an accessory (*le caractère d'un accessoire*), and it cannot be taken independently of the coast (*indépendamment de la côte*). Speaking of '*Les Frontières*' he says: 'I have spoken already of the frontier of the sea, and of that of the land. There exist also special limits for the wants of administration because
 107 the geographical and political frontier (*la frontière politique et géographique*) do not always answer in a sufficient manner.' The distinction thus clearly recognized between a geographical and political frontier is too obvious to require further illustration.

"If the geographical frontier happens to be on the sea or ocean, it is known as the coast, the point of contact between the sea water and the land, upon which the political frontier is superimposed as an accessory that can not be taken independently of the coast (*et qu'on ne saurait l'acquérir indépendamment de la côte*). That dependent and accessorial frontier created by international law, solely for the purposes of jurisdiction, is annexed *only to the outer coast* of a maritime state which it shortens by cutting across the heads of bays and inlets, thus following what is called the general trend of the coast."

"The artificial coast line created by international law for the purposes of jurisdiction only, which, following the general trend of the coast, cuts across the heads of bays and inlets is not involved in this case in any form; for the simple reason that *the outer coast*, to which it is exclusively an accessory, is not involved."

Great Britain claims to draw the line from which the treaty limits are to be measured from the headlands of all those tracts of water which were known as bays, harbours, or creeks at the date of the treaty. She does not claim to draw the line between every two points of British territory.

REPLY TO UNITED STATES COUNTER-CASE.

It has already been observed that in the Counter-Case of the United States the position of Great Britain in regard to bays is wrongly stated. (United States Counter-Case, p. 68.) The contention put forward by Great Britain throughout the present proceedings, and repeated in the present Argument, is the contention which Great Britain has maintained from the very first moment when the controversy arose. It is not the fact that Great Britain has been reluctant to insist on that contention, nor is it the fact that she has refrained from attempting to apply it. Fair effect must be given to the words of the treaty, and their scope cannot be limited by reference to such views, as to the extent of territorial waters, as are advocated by the United States.

REVIEW OF CONTROVERSY.

His Majesty's Government has already submitted that the answer to the question now under consideration must primarily be
 108 determined by the terms of the treaty itself, and not by other considerations. But the conduct of the parties since 1818 is a matter which has been discussed, and it is thought convenient to present a summary of the more important facts. They have already been set out at some length in the British Case.

It is established, by evidence to which attention has been called in the British Counter-Case, that no question as to bays arose until the year 1836. The fishery exercised by Americans up to that time was almost entirely on the high seas. But about the year 1836, the mackerel deserted the American coast and the United States fishermen began to follow them into Canadian waters. The mackerel fishery is an in-shore fishery. In 1836, therefore, controversy as to bays first arose. (British Counter-Case, p. 88.)

PERIOD OF 1838-1845.

In 1838 the attention of His Majesty's Government was called to the encroachments of American fishermen in British bays, &c. Lord Palmerston, on the 6th October, 1838, instructed Mr. Fox (British Minister at Washington) to give notice to the United States Government of the intention of His Majesty's Government to take the necessary steps, and, in doing so, to say that (British Case, App., p. 117)—

"The chief matter of complaint is, that American citizens in violation of the Convention of 1818, enter the gulfs, bays, harbours, creeks, narrow seas, and waters of the Colonies, and that they land on the shores of Prince Edward and the Magdalen Islands, and by force, aided by superior numbers, drive British fishermen from banks and fishing grounds solely and exclusively British.

* * * * *

"You will observe that the points which Her Majesty's Government have to enforce are:

"1st. That the three marine miles within which the citizens of the United States are by the Convention prohibited from fishing, must be calculated from the headlands of Nova Scotia, and not as the Americans contend, from a line curving and corresponding with the coast;"

In the same year, Lieutenant Commanding Paine was sent by the United States to inspect the fishing grounds, and he came to the conclusion that it had become necessary in American interests to claim a right to fish in the bays. In his report (29th December, 1839) he said (British Case, App., p. 121):—

"In my late cruise on the coasts of Her Britannic Majesty's provinces, I found the convention of 1818, on the subject of fisheries, 109 so variously construed, that I deemed it proper to address the Navy Department on the subject—the letters to which I alluded in conversation with you."

He mentioned as one of "the questions on which dispute may arise:"—

"The meaning of the word *Bay*, in the convention of 1818, where the Americans relinquish the rights before claimed or exercised, of fishing in or upon any of the coasts, *bays*, &c., of Her Britannic Majesty's provinces, not before described, nearer than three miles.

"The authorities of Nova Scotia seem to claim a right to exclude Americans from all bays, including those large seas such as the Bay of Fundy and the Bay of Chaleurs; and also to draw a line from headland to headland; the Americans not to approach within three miles of this line.

"The fishermen, on the contrary, believe they have a right to work any where, if not nearer than three miles to the land."

And he added:—

"If the grounds assumed by the British provincial authorities be carried out, it will be in their power to drive the Americans from those parts of the coast where are some of the most valuable fisheries: whereas, if the ground maintained by the Americans be admitted, it will be difficult to prevent their procuring articles of convenience, and particularly bait; from which they are precluded by the convention, and which a party in the provinces seems resolved to prevent."

Two years afterwards the matter was taken up by the United States Government, and it is at this date that the American claim was first put forward officially. On the 20th February, 1841, the United States Secretary of State wrote to Mr. Stevenson (United States Minister at London) a letter, in which, adopting the idea of Lieutenant-Commanding Paine, he said (British Case, App., p. 124):—

"From information in the possession of the department, it appears that the provincial authorities assume a right to exclude American vessels from all their bays, even including those of Fundy and

Chaleurs, and to prohibit their approach within three miles of a line drawn from headland to headland.

* * * * *

“Our fishermen believe, and they are obviously right in their opinion, if uniform practice is any evidence of correct construction, that they can with propriety take fish any where, on the coast of the British provinces, if not nearer than three miles to land, and resort to their ports for shelter, wood, water, &c.”

In pursuance of the instructions of this despatch, Mr. Stevenson sent a long letter (27th March, 1841) to Lord Palmerston, in which he said (British Case, App., p. 126):—

“It also appears, from information recently received by the Government of the United States, that the provincial authorities assume a right to exclude the vessels of the United States from all their bays, (even including those of Fundy and Chaleurs,) and likewise to prohibit their approach within three miles of a line *drawn from headland to headland, instead of from the indents of the shores of the provinces.*”

The claim thus formulated was transmitted to Lord Falkland (the Governor of Nova Scotia), who in his reply (8th May, 1841), after combating it upon various grounds, added (British Case, App., p. 128)—

“Indeed the claim now set up there is reason to think is *new*, as in point of *practice* the American fishermen when questioned for being within the waters of the province, have uniformly resorted to the pretexts afforded by the Convention, viz.: the want of shelter, repairs or wood and water, and *never* it is believed have asserted the *right* to fish within the *bays or harbours* of the coasts.”

* * * * *

“The American Minister states in his Despatch that, ‘the fishermen of the United States believe, (and it would seem they are right in their opinion if uniform practice be evidence of correct construction,) that they can with propriety take fish anywhere on the coasts of the British provinces, if not nearer than three marine miles to land.’

“This from the general context of Mr. Stevenson’s note evidently means, within three miles of the indents of the shore, ‘the *uniform practice*’ alluded to by that gentleman is a practice which has always been *resisted* by the authorities of this colony, altho’ it is difficult with an extended coast and inadequate means of protection entirely to *suppress* it.”

This statement by Lord Falkland establishes the fact that the Colonial authorities had never acquiesced in fishing by Americans in the bays.

The United States Case suggests that (United States Case, p. 103)—

“The course pursued by the British Government in dealing with the protest of the United States as expressed in Mr. Stevenson’s note throws considerable light upon Great Britain’s understanding of the true intent and meaning of the treaty provisions under which these

questions arose. It will be found that instead of expressing any dissent or protest in answer to Mr. Stevenson's criticism of Nova Scotia's proposed interpretation of the treaty, Great Britain promptly referred his note to the Provincial Government with a request for a report on which to base its reply. This delay obviously would have

111 been wholly unnecessary if the understanding of the British Government at that time as to the meaning of these treaty provisions had differed materially from that expressed by Mr. Stevenson. Moreover, as will appear in the later correspondence, after this report was received, the British Government still refrained from stating its position on the subject of Nova Scotia's novel interpretation of the meaning of the word 'bays' in reply to Mr. Stevenson's inquiry until that question could be submitted to the Law Officers of the Crown for an opinion, and even after their opinion was rendered in support of the Nova Scotian construction, Great Britain showed a decided inclination to avoid the effect of such opinion by proposing a relaxation of the narrow construction recommended by it, and was only prevented from so doing by vigorous protests from Nova Scotia. It will also appear from the subsequent correspondence that no answer whatever was made by Great Britain to the other question presented by Mr. Stevenson."

Mr. Stevenson had attributed to Nova Scotia certain actions and certain opinions. He did not put to Lord Palmerston a mere abstract question which could be discussed academically. His letter was not confined to the question of headlands, it related to other matters also, and he remonstrated against "the illegal and vexatious proceedings of the authorities of Nova Scotia." Reference of the letter to the Nova Scotia Government was, therefore, necessary before a reply could be sent.

The statement as to Great Britain's "decided inclination," and the "vigorous protests from Nova Scotia," is based upon complete misapprehension. Not only was a relaxation proposed, but it was actually made by Lord Aberdeen in his letter of the 10th March, 1845. And there were no vigorous protests against this concession. On the contrary the Nova Scotia Government concurred in it (as will shortly be pointed out) upon the ground that the United States had, on their part, conceded the correctness of the British view of the headland question (by Mr. Everett's letter, shortly to be quoted); and it was, no doubt, because of the Governor's letter (of the 17th September, 1844) that the concession was made.

Afterwards (19th May, 1845) the new Colonial Secretary (Lord Stanley), not apparently appreciating the value of the bays as fishing grounds, suggested to the Governors of Nova Scotia and New Brunswick a further relaxation of (British Case, App., p. 146)—

"the strict rule of exclusion exercised by G. Britain over the fishing vessels of the U. States entering the bays of the sea on the B.N. American coasts."

112 and added:—

“I have to request that your Lordship would inform me whether you have any objections to offer, on provincial or other grounds, to the proposed relaxation of the construction of the Treaty of 1818 between this country and the U. States.”

Nova Scotia and New Brunswick did object, and Lord Stanley wrote to the Governor of Nova Scotia (17th September, 1845):—

“Her Majesty’s Government have attentively considered the representations contained in your Despatches Nos. 324 & 331, of the 17th June and 2nd July, respecting the policy of granting permission to the fishermen of the U. States to fish in the Bay of Chaleurs and other large bays of a similar character on the coasts of N. Brunswick and Nova Scotia, and, apprehending from your statements that any such general concession would be injurious to the interests of the British North American Provinces we have abandoned the intention we had entertained upon the subject, and shall adhere to the strict letter of the Treaties, which exist between Great Britain and the U. States relative to the fisheries in North America, except in so far as they may relate to the Bay of Fundy which has been thrown open to the Americans under certain restrictions.” (British Case, App., p. 151.)

It is submitted that this correspondence most clearly shows that the British Government had no doubt whatever as to their right under the treaty, and that there is no colour for the suggestion that the proposed relaxation proceeded from any hesitation as to the rights of Great Britain, or from any cause other than a desire to avoid friction.

That no formal reply was made by the British Government to Mr. Stevenson’s letter of the 27th March, 1841, appears to have been due to the fact that the British Foreign Office were under the impression that there was no intention upon the part of the United States to press Mr. Stevenson’s point; for in a letter which the Colonial Secretary (Lord Stanley) sent to Lord Falkland (29th November, 1842) he said:—

“I enclose for your information a copy of the Report, which on the 30th August was received from the Queen’s Advocate and Her Majesty’s Attorney General, on the case drawn up by Your Lordship; since that date the subject has frequently engaged the attention of myself and my colleagues, with the view of adopting further measures if necessary, for the protection of British interests in accordance with the law as laid down in the enclosed Report. We have, however, on full consideration come to the conclusion, as regards the Fisheries of Nova Scotia, that the precautions taken by the
113 Provincial Legislature appear adequate to the purpose, and that being now practically acquiesced in by the Americans, no further measures are required.” (United States Case, p. 108.)

EVERETT-ABERDEEN CORRESPONDENCE.

On the 10th May, 1843, the United States fishing-vessel "Washington" was seized for fishing in the Bay of Fundy, at a distance of more than three miles from the shore. Complaint was made (10th August, 1843), by letter from Mr. Everett (United States Minister in London) to Lord Aberdeen, Secretary of State for Foreign Affairs, in which he said that the seizure appeared to have been made (British Case, App., p. 131)—

"on the ground that the lines within which American vessels are forbidden to fish, are to run from headland to headland, and not to follow the shore. It is plain, however, that neither the words nor the spirit of the convention admits of any such construction; nor, it is believed, was it set up by the provincial authorities for several years after the negotiation of that instrument.

In view of the subsequent modification by Mr. Everett of this opinion, it is important to observe that, in some way, he had been misled as to the wording of the treaty which he was interpreting. In an earlier part of the same letter he said (British Case, App., p. 130):—

"By the first article of the convention above alluded to, the United States renounce any liberty heretofore enjoyed or claimed by their inhabitants to take, dry, or cure fish on or within three marine miles of any of the coasts of her Majesty's dominions in America, for which express provision is not made in the said article. This renunciation is the only limitation existing on the right of fishing upon the coasts of her Majesty's dominions in America, secured to the people of the United States by the third article of the treaty of 1783."

It will be observed that Mr. Everett was not aware that the three miles was to be measured not only from the "coasts" but from the "bays, creeks or harbors." Lord Aberdeen's reply (15th April, 1844) called attention to the mistake; and Mr. Everett immediately modified his opinion. Replying to Lord Aberdeen (25th May, 1844), he said (British Case, App., p. 134):—

"The existing doubt as to the construction of the provision arises from the fact that a broad arm of the sea runs up to the northeast, between the provinces of New Brunswick and Nova Scotia. This arm of the sea being commonly called the Bay of Fundy, though not in reality possessing all the characters usually implied by the term 'bay,' has of late years been claimed by the provincial authorities of Nova Scotia to be included among 'the coasts, bays, creeks and harbors' forbidden to American fishermen.

"An examination of the map is sufficient to show the doubtful nature of this construction. It was notoriously the object of the article of the treaty in question to put an end to the difficulties which had grown out of the operations of the fishermen from the United States along the coasts and upon the shores of the settled portions of the country, and for that purpose to remove their vessels to a dis-

tance not exceeding three miles from the same. In estimating this distance, the undersigned admits it to be the intent of the treaty, as it is itself reasonable, to have regard to the general line of the coast; and to consider its bays, creeks and harbors, that is, the indentations usually so accounted, as included within that line. But the undersigned cannot admit it to be reasonable, instead of thus following the general directions of the coast, to draw a line from the south-western-most point of Nova Scotia to the termination of the northeastern boundary between the United States and New Brunswick, and to consider the arms of the sea which will thus be cut off, and which cannot, on that line be less than sixty miles wide, as one of the bays on the coast from which American vessels are excluded. By this interpretation the fishermen of the United States would be shut out from the waters distant, not three, but thirty miles from any part of the colonial coast. The undersigned cannot perceive that any assignable object of the restriction imposed by the convention of 1818 on the fishing privilege accorded to the citizens of the United States by the treaty of 1783 requires such a latitude of construction.

"It is obvious that (by the terms of the treaty) the furthest distance to which fishing vessels of the United States are obliged to hold themselves from the colonial coasts and bays, is three miles. But, owing to the peculiar configuration of these coasts, there is a succession of bays indenting the shores both of New Brunswick and Nova Scotia, within the Bay of Fundy. The vessels of the United States have a general right to approach all the bays in her Majesty's colonial dominions, within any distance not less than three miles—a privilege from the enjoyment of which they will be wholly excluded—in this part of the coast, if the broad arm of the sea which flows up between New Brunswick and Nova Scotia, is itself to be considered one of the forbidden bays.

* * * * *

"The undersigned trusts that the Earl of Aberdeen, on giving a renewed consideration to the case, will order the restoration of the Washington, if still detained, and direct the colonial authorities to abstain from the further capture of the fishing vessels of the United States under similar circumstances, till it has been decided between the two governments whether the Bay of Fundy is included among 'the coasts, bays, creeks and harbors' which American vessels are not permitted to approach within three miles." (British Case, App., p. 135.)

115 It is clear from this letter that the United States did not contend, in 1844, that the three marine miles must be measured from the sinuosities of the coast. Mr. Everett in terms admits that it is to be measured from the general line of the coast, and that bays, creeks and harbours, that is the indentations usually so accounted, should be included within that line although he makes an exception in the case of the Bay of Fundy.

Lord Aberdeen referred the question as to the Bay of Fundy to the Governor of Nova Scotia, and received a reply (17th September, 1844), in which the Governor (Lord Falkland) after discussing the

objection to making any concession, even in regard to the Bay of Fundy, said (British Case, App., p. 136) :—

“When however I perceive that Mr. Everett, in his note of the 25th May 1844, addressed to Lord Aberdeen admits that (in estimating the distance of three miles from the shore within which American fishermen are not permitted to approach) it is ‘the intent of the treaty, as it is in itself reasonable to have regard to the general line of the coast and to consider its bays creeks and harbours, that is the indentations so accounted, as included within that line,’ which I take to be an acquiescence in the opinion of Messrs. Dodson and Wilde,^a that the distance within which American fishermen must not approach is three miles from a line drawn from headland to headland, taking the general configuration of the coast; I cannot but conceive that a great portion of what I have contended for, (in my despatch No. 75, date May 8th, 1841, addressed to Lord John Russell) on the part of the province, is conceded, and it is therefore my unreserved opinion, provided always that this interpretation of Mr. Everett’s phraseology be correct, that that which is now asked by the Americans may be granted, without evil consequences, if due care be taken that no further pretensions can hereafter be founded on the concession.”

On the 10th March, 1845, Lord Aberdeen addressed the following letter to Mr. Everett (British Case, App., p. 141) :—

“The undersigned will confine himself to stating that after the most deliberate reconsideration of the subject, and with every desire to do full justice to the United States, and to view the claims put forward on behalf of United States’ citizens in the most favorable light, her Majesty’s government are nevertheless still constrained to deny the right of United States’ citizens, under the treaty of 1818, to fish in that part of the Bay of Fundy which, from its geographical position, may properly be considered as included within the British possessions.

“Her Majesty’s government must still maintain, and in this view they are fortified by high legal authority, that the Bay of
116 Fundy is rightfully claimed by Great Britain as a Bay within the meaning of the treaty of 1818. And they equally maintain the position which was laid down in the note of the undersigned, dated the 15th of April last, that, with regard to the other bays on the British American coasts, no United States fisherman has, under that convention, the right to fish within three miles of the *entrance* of such bays as designated by a line drawn from headland to headland at that entrance.

“But while Her Majesty’s government still feel themselves bound to maintain these positions as a matter of right, they are nevertheless not insensible to the advantages which would accrue to both countries from a relaxation of the exercise of that right; to the United States as conferring a material benefit on their fishing trade; and to Great Britain and the United States, conjointly and equally, by the removal of a fertile source of disagreement between them.

“Her Majesty’s government are also anxious, at the same time that they uphold the just claims of the British crown, to evince by every

^a The English law officers.

reasonable concession they desire to act liberally and amicably towards the United States.

"The undersigned has accordingly much pleasure in announcing to Mr. Everett, the determination to which her Majesty's government have come to relax in favour of the United States fishermen, that right which Great Britain has hitherto exercised, of excluding those fishermen from the British portion of the Bay of Fundy, and they are prepared to direct their colonial authorities to allow henceforward the United States fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach, except in the cases specified in the treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick."

Mr. Everett replied on the 25th March, 1845, saying that while he desired (British Case, App., p. 143)—

"without reserve, to express his sense of the amicable disposition evinced by her Majesty's government on this occasion in relaxing in favor of the United States the exercise of what, after deliberate reconsideration, fortified by high legal authority, is deemed an unquestioned right of her Majesty's government, the undersigned would be unfaithful to his duty did he omit to remark to Lord Aberdeen that no arguments have at any time been adduced to shake the confidence of the government of the United States in their own construction of the treaty. While they have ever been prepared to admit, that in the letter of one expression of that instrument there is some reason for claiming a right to exclude United States fishermen from the Bay of Fundy, (it being difficult to deny to that arm of the sea the name of 'bay,' which long geographical usage has assigned to it), they have ever strenuously maintained that it is only on their own construction of the entire article that its known design in reference to the regulation of the fisheries admits of being carried into effect.

117 "The undersigned does not make this observation for the sake of detracting from the liberality evinced by her Majesty's government in relaxing from what they regard as their right; but it would be placing his own government in a false position to accept as mere favor that for which they have so long and strenuously contended as due to them under the convention."

Lord Aberdeen in his answer of the 21st April, 1845, stated that the relaxation was intended to refer to the Bay of Fundy only. (British Case, App., p. 145.)

This Aberdeen-Everett correspondence is important. In Mr. Everett's view, the liberty to fish in the Bay of Fundy was (British Case, App., p. 143)—

"the point of greatest interest in the discussions which have been hitherto carried on between the two governments, in reference to the United States' right of fishery on the Anglo-American coasts:"

and his concession of the validity of the general principle of the British contention had resulted in his securing a relaxation of its application to the Bay of Fundy. The case of the "Argus" (British

Case, App., p. 145) was, indeed, unsettled, but, as to it, Mr. Everett anticipated a favourable response. The United States, therefore, had good reason for gratification. On the other hand, Great Britain had obtained an admission of the general claim to bays for which she had always contended. It is to be remembered, too, that this admission by Mr. Everett was approved of by the President of the United States. (British Case, App., p. 135.)

Both parties appear to have assumed that differences had practically been settled. The British Government, on its part, continued to exclude American fishermen from all the bays, except the Bay of Fundy; and very shortly after the arrival at Washington of Lord Aberdeen's letter, a paragraph appeared (June, 1845) in the "Union" (United States Case, App., pp. 549, 1264-5. British Case, App., p. 197)—

"a newspaper" (as Mr. Lorenzo Sabine said in his report) "supposed to enjoy the confidence of our government, and said, in the popular sentiment, to be its 'organ'" (United States Case, App., p. 1231)—

in the following terms:—

"We are gratified to be now enabled to state, that a despatch has been recently received at the Department of State from Mr. Everett, our minister at London, with which he transmits a note from Lord Aberdeen, containing the satisfactory intelligence that, after a reconsideration of the subject, although the Queen's government adhere to the construction of the convention which they have always main-

118 tained, they have still come to the determination of relaxing from it, so far as to allow American fishermen to pursue their avocations in any part of the Bay of Fundy, provided they do not approach—except in the cases specified in the treaty of 1818—within three miles of the *entrance* of any bay on the coast of Nova Scotia or New Brunswick.

"This is an important concession, not merely as removing an occasion of frequent and unpleasant disagreement between the two governments, but as reopening to our citizens those valuable fishing grounds within the Bay of Fundy which they enjoyed before the war of 1812, but from which, as the British government has since maintained, they were excluded by the convention of 1818."

It will be observed that the language of the proviso is a textual reproduction of Lord Aberdeen's letter, even to the use of the italic letters in the word "*entrance*."

REPORT OF MR. SABINE.

This announcement was unpalatable to some Americans interested in fishing. It aroused the opposition of Mr. Lorenzo Sabine, who for the next year laboured, with letters and newspaper articles, to rouse public opinion. He was unsupported, and as he himself said abandoned the design finally in despair. (United States Case, App., pp. 1231-2.)

In 1852, Mr. Sabine prepared a Report, dated the 6th December, 1852, on the fisheries, for the United States Government, and in it he clearly indicated that the United States had considered the question of bays to be practically settled. The Report contained the following passage:—

“The assertion, from *such* a source, that the British government had ‘*always maintained*’ the construction of the convention contended for in the ‘case’ submitted to the crown lawyers by Lord Falkland, in 1841; the annunciation that our vessels were no longer to fish ‘*within three miles of the ENTRANCE of any bay on the coast of Nova Scotia or New Brunswick,*’ the Bay of Fundy alone excepted; the further declaration that the fishing grounds of that bay ‘enjoyed before the war of 1812,’ and lost to us by that event, were now ‘reopened’ to us by ‘an important concession’—excited the liveliest sensibility and were regarded in the fishing towns of Maine and Massachusetts with dismay. The colonists had pushed their claims so secretly and so adroitly, that the crowning acts of their policy were hardly known to our countrymen who resorted to their seas; and the fact that the Bay of Fundy was in *dispute*, was first ascertained by many of them on the seizure of the ‘Washington’ for fishing there. It was expected that some more definite annunciation would be made, or that the correspondence between Mr. Everett and the British government, which preceded and led to the ‘concession,’ would fol-

low the article just quoted from the ‘Union;’ but the precise
119 terms of the arrangement of 1845 were never stated, either in that paper or elsewhere, and the citizens whose property was exposed to capture by British cruisers and colonial cutters were left to pursue their business in apprehension and doubt. Under these circumstances, the writer of this report assumed the task of attempting to impress the public mind with the probable state of affairs. He wrote for the periodical and for the newspaper press; he addressed letters to persons interested in enterprises to the British colonial seas, and to persons in official employments; he continued his labors, in various other ways, for quite a year: he was unsupported, and abandoned the design finally in despair.” (United States Case, App., p. 1231.)

And referring to the despatch of Lord Stanley of the 17th September, 1845, in which the decision of Her Majesty’s Government to insist on the British view of the treaty was recorded, Mr. Sabine said (United States Case, App., p. 1243):—

“It is possible that, had our government seconded the efforts of our minister at the Court of St. James, and had instructed him, in positive and earnest terms, that the pretensions and claims of the colonists, which were at last adopted by the British government, had not been, and never would be, admitted as a just and proper commentary on the convention of 1818, the despatch from which the preceding extract is made would never have been written; and that of consequence the excitement and difficulties of 1852 would never have occurred. As it was, the children of the ‘tories’ triumphed over the children of the ‘whigs’ of the Revolution.”

In a later passage, Mr. Sabine again spoke of Mr. Everett's "arrangement of 1845," and said that it was "in effect an abandonment of the whole matter." (United States Case, App., p. 1285.)

United States acceptance of the Aberdeen settlement is, moreover, the only possible explanation of the fact stated in Mr. Sabine's Report that (United States Case, App., p. 1248)—

"as far as there is evidence before the public, the fisheries were not once mentioned by Mr. McLane, (who succeeded Mr. Everett,) in his correspondence with the British government, during his mission. Nothing, in fact, seems to have passed between the two cabinets relative to the subject for more than six years, though England retraced no step after opening the Bay of Fundy."

After the settlement had been in operation for some years, the President of the United States, in his Message of December 1852, said (United States Case, App., p. 1265):—

"American fishing vessels, within nine or ten years, have
120 been excluded from waters to which they had free access for twenty-five years after the negotiation of the treaty. In 1845, this exclusion was relaxed so far as concerns the Bay of Fundy, but the just and liberal intention of the home government, in compliance with what we think the true construction of the convention, to open all the other outer bays to our fishermen, was abandoned, in consequence of the opposition of the colonies. Notwithstanding this, the United States have, since the Bay of Fundy was reopened to our fishermen in 1845, pursued the most liberal course towards the colonial fishing interests."

PERIOD OF 1852-1854.

The events of the year 1852 clearly indicate the adherence of the United States Government to the settlement arrived at in 1845. Increased vigilance on the part of the British protective service having been announced, Mr. Daniel Webster (United States Secretary of State) issued a Notice in which, admitting that the term "bays," as usually understood, was "applied equally to small and large tracts of water thus situated," he informed United States fishermen how the case then stood. In his Notice he said (British Case, App., p. 153):—

"It would appear that, by a strict and rigid construction of this Article, fishing vessels of the United States are precluded from entering into the bays or harbours of the British Provinces, except for the purposes of shelter, repairing damages, and obtaining wood and water. A bay, as is usually understood, is an arm or recess of the sea, entering from the ocean between capes or headlands; and the term is applied equally to small and large tracts of water thus situated. It is common to speak of Hudson's Bay, or the Bay of Biscay, although they are very large tracts of water.

"The British authorities insist that England has a right to draw a line from headland to headland, and to capture all American fishermen who may follow their pursuits inside of that line. It was

undoubtedly an oversight in the Convention of 1818 to make so large a concession to England, since the United States had usually considered that those vast inlets or recesses of the Ocean ought to be open to American fishermen, as freely as the sea itself, to within three marine miles of the shore."

Attempt has been made to minimise the effect of Mr. Webster's declaration, and it is sometimes said that Mr. Webster indicated in his Notice that the "strict and rigid construction" was not the true construction. But Mr. Webster said nothing to that effect. His language was (British Case, App., p. 153) :—

"Not agreeing that the construction thus put upon the treaty is conformable to the intentions of the Contracting Parties, this information is, however, made public, to the end that those concerned in the American fisheries may perceive how the case
121 at present stands, and be upon their guard."

In Mr. Webster's view, the British interpretation of the language of the treaty was correct; but he suggested that possibly the language had not properly expressed that which its authors had intended.

That Mr. Webster meant, by the language of his circular, precisely what he said, is shown (if that be necessary) by a despatch from Mr. Crampton (British Minister at Washington) to Lord Malmesbury (2nd August, 1852) :—

"I observe with satisfaction that Mr. Webster now clearly perceives and fairly admits the correctness of the construction of the Convention of 1818 maintained by Her Majesty's Government. The opinion of the Queen's Advocate and of the Attorney General is, Mr. Webster said, 'undoubtedly right':—and he afterwards informed me that the President, from whom he had just received a letter on the subject, now concurred in that opinion." (British Case, App., p. 157.)

Mr. Rush (one of the negotiators of the treaty of 1818) understood Mr. Webster's language as an admission of the validity of the British contention, and wrote a letter (18th July, 1853) in which, declaring that the negotiators could not be chargeable with "oversight," he attributed Mr. Webster's language to "momentary inadvertence." (United States Case, App., p. 557.)

The United States Case suggests that Mr. Webster's notice could not have been understood by the British Government as an acceptance of its view as to the meaning of the word "bays," because the British Foreign Secretary (Lord Malmesbury) shortly afterwards expressed regret that it should have been published. (United States Case, p. 129.)

But this suggestion disregards the true meaning of Lord Malmesbury's language. The expression of regret had no reference whatever to that part of Mr. Webster's announcement which has just

been under discussion. In his Notice Mr. Webster had also said (British Case, App., p. 152) :—

“With the recent change of Ministry in England has occurred an entire change of policy.”

And after referring to the British contention, he said :—

“It is this construction of the intent and meaning of the Convention of 1818 for which the colonies have contended since 1841,
122 and which they have desired should be enforced. This the English Government has now, it would appear, consented to do, and the immediate effect will be, the loss of the valuable fall-fishing to American fishermen; a complete interruption of the extensive fishing business of New England, attended by constant collisions of the most unpleasant and exciting character, which may end in the destruction of human life, in the involvement of the Government in questions of a very serious nature, threatening the peace of the two countries.”

As a matter of fact there had been no change of policy whatever, and it was in respect of such statements as those above quoted that Lord Malmesbury expressed regret that the Notice had been issued. Upon the subject of bays, Lord Malmesbury expressly refrained from remark. He said (British Case, App., p. 171) :—

“As I propose that this despatch shall merely explain away certain points which have clearly been misunderstood, I shall abstain, for the present, from entering into a discussion upon the interpretation to be given to the term ‘bay;’”

As against all this, the United States Case says (United States Case, p. 129) :—

“Furthermore the opinion held by Mr. Webster at that time as to the meaning of the word ‘bays’ as used in the treaty, is set forth with great clearness and force in a memorandum prepared by him in July, 1852, to be sent to Mr. Crampton, but which unfortunately was never sent owing to Mr Webster’s failing health and untimely death before it was completed. This memorandum shows an exhaustive study of the entire history of the fisheries controversy, and in it Mr. Webster reaches the conclusion that the term ‘bays’ as used in the renunciatory clause means the inner bays in distinction from the outer part of the great indentations of the coast.”

What Mr. Webster in fact said in the memorandum on this point was as follows (United States Case, App., p. 530) :—

“Most clear is it then, that the term *bay*, used in the proviso, means landlocked recesses, places inaccessible to winds, in short natural harbours.”

But this view is quite inconsistent with that now presented on behalf of the United States, and is, it is submitted, obviously untenable. The concession of the right to take shelter clearly applies to such bays and harbours as are suitable for shelter, and cannot possibly have

the effect of limiting the exclusion for fishing purposes to bays, creeks, or harbours of that class.

123 The memorandum, it will be observed, was never finished, and it is impossible to say how far Mr. Webster, if he had finished it, would have modified the expressions on which the Case for the United States relies. It may be presumed, for example, that he would have corrected the following very important sentence referring to the negotiation of the 1818 treaty (United States Case, App., p. 529) :—

“On the contrary, it will be found that all their conferences, all their conversations, and all memoranda upon the subject, are confined to the fishing within the three miles from the shore, and the curing & drying of fish on the shore. It is clear therefore, that the words of the Treaty are to be explained by reference to this plain and indubitable understanding of the parties.”

All the assumptions made in this passage are without foundation, and further enquiry would have satisfied the author that the basis upon which he thus rested his conclusion was quite unsound.

The acceptance by the United States of Lord Aberdeen's letter as a settlement is evidenced also by the action of the Commodore of the United States war-vessel in 1852. In the season of that year a British fleet under Vice-Admiral Seymour was engaged in patrolling the fishing grounds; and one of his Commanders (Campbell) was particularly employed in keeping American fishermen out of the Bay of Chaleurs. (British Case, App., p. 190.)

Commodore Perry, of the United States navy, was, at the same time, engaged in observing the operations of the British vessels; and both the British Vice-Admiral and Commander Campbell have left records of conversation with him. The Vice-Admiral (17th August, 1852) said (British Case, App., p. 192) :—

“The Commodore was disposed to admit that the proper limits of the Bay of Chaleur were Miscon and Cape Despair & that the U. S. vessels should keep 3 miles beyond a line drawn between those points but as I observe Capt. Bayfield states the northern boundary is generally considered Point Macquereau it is probable the Americans may claim it as the northern limits of the bay.

“I observed that the same principle which he was disposed to apply to the Bay of Chaleur should attach as against fishing purposes to Georges Bay, at the western end of the Gut of Canso. The Commodore did not dissent nor did he agree further to this observation than in allowing the immediate headlands of bays to form their proper boundaries.”

124 In a report of the operations of the following year (21st July, 1853), the Vice-Admiral said (British Case, App., p. 202) :—

“Commodore Perry, in 1852, although not officially authorized to establish what were fishing-grounds open to his countrymen, did not

attempt to urge that Chaleur was of that description, and did not himself enter the bay."

Commander Campbell appears to have been present at the conversation of 1852, to which the Vice-Admiral referred, and in a report of 26th August, 1852, he recounted a subsequent one in this way (British Case, App., p. 195):—

"Commodore Perry in alluding to the fisheries told me, that he was fully aware that the United States fishermen frequently violated the Treaty, and pointed out what he considered the limits in nearly the same words, as he used while speaking to you in my presence on board the '*Cumberland*.' I did not enter upon the subject with him more than I could help, but on his asking me, what I considered the sea boundary of the Bay of Chaleur, I told him that I thought from Miscon Point, to Point Macqueron, but that I was merely giving my private opinion.

"The Commodore then told me that all the fishermen he had seen complained more of the exclusion from Chaleur Bay, than any other part of the Gulf, but that he told them distinctly they could not fish in that bay without clearly violating the Treaty and that they must take the consequences if they attempted it."

The action of Mr. Webster was the subject of debates in Congress, and some of the speeches are material as showing the real cause of the difficulty. The speakers pointed out that the fisheries had changed since 1818, and that the mackerel fishery, an inshore fishery, which was then of no account, had since become important. Representative Tuck, for example, said:—

"From the first of September to the close of the season, the mackerel run near the shore, and it is next to impossible for our vessels to obtain fares without taking fish within the prohibited limits. We differ with England in regard to the measurement of these 'limits,' they claiming to run from 'headland to headland' and we to follow the indentations of the coast. But the real difficulty is not here.

* * * * *

"I do not think it generally known that the whole difficulty about the fisheries is about our right to take mackerel. The cod fishing privileges are adequate already; and no vessel in that business has ever been seized or interfered with. I think it is proper to go still further, and to state frankly what, after a patient investigation of every source of authentic information within my reach, I believe to be the real difficulty.

125 "The real truth is, our fishermen need absolutely, and must have, the thousands of miles of shore fishery which have been renounced, or they must always do an uncertain business. If our mackerel men are prohibited from going within three miles of the shore, and are forcibly kept away, (and nothing but force will do it), then they may as well give up their business first as last. It will be always uncertain, and generally unsuccessful, however well pursued.

"Perhaps I shall be thought to charge the commissioners of 1818, with overlooking our interests. They did so, in the important renunciation which I have quoted; but they are obnoxious to no complaints for so doing. In 1818, we took no mackerel on the coasts of the British possessions, and there was no reason to anticipate that we should ever have occasion to do so. Mackerel were then found as abundantly on the coast of New England as anywhere in the world, and it was not till years after this that this beautiful fish, in a great degree, left our waters. The mackerel fishery on the provincial coasts has principally grown up since 1838, and no vessel was ever licensed for that business in the United States till 1828. The commissioners in 1818 had no other business but to protect the cod fishery, and this they did in a manner generally satisfactory to those most interested."

In the blank indicated by the asterisks in the above occurred the following passage:—

"The British have never taken a vessel as a trespasser when not within the limits which we acknowledge we have renounced. They have given particular directions to the officers of their vessels not to do so, and the reason is plain. They know that if they exact a strict observance of our renunciation, on our own construction, they break up our mackerel fishery. Hence it would be folly in them to raise an issue on the 'headland' doctrine on which most people, I think, would hold our construction to be the true one."

It is obvious that this passage has no relevance to the purpose for which the quotation was made in the British Case and in this Argument, but His Majesty's Government desires to express its regret that, by a mistake, the asterisks indicating the absence of this passage were omitted in the citation made in the British Case. The quotation, as made in the British Case appears not to have been checked, as two other obvious blunders occur. (British Case, p. 97.)

During the debate in the Senate, it was contended by Senator Soule that bays less in width than six miles were "private bays";
 126 that all others were part of the ocean; and that therefore, in the case of the smaller bays, the headlands would, for the purpose of measuring the three miles, be connected by an imaginary line. The Senator said (British Case, App., p. 178):—

" 'Such bay,' says an eminent writer, 'must communicate with the ocean only by a strait so narrow that it must be reputed as being a part of the maritime domain of the State to which the coast belongs; so that you cannot enter it without going through the territorial sea of that State; which means twice the distance of a gun-shot, or six miles. It is required besides that *all* the coasts bordering on such bay be subject to the State claiming such strait. The two conditions must unite to give to any part of the ocean the character of an internal sea, or a *mare clausum*.'

* * * * *

"The Convention of 1818, therefore, excludes us from no part of the littoral seas washing Her Majesty's Dominions, without three

marine miles of the coast of such littoral seas, be they bays, gulfs, or other inlets, unless the coast bordering the same be all under her sovereignty, and unless the strait formed by the headlands at their entrance exceeds six miles in length. The question is here entirely solved and put at rest. It only remains to be ascertained how distant be the headlands at the entrance of the Bays of Fundy, of Chaleurs, and elsewhere. Are they more widely apart than six miles? Then the bays are as open and free as the main ocean itself. Are they within the line of the six miles? Then they are private bays, bays shut up from the commerce of the rest of mankind, at the will of the riparious Sovereign, provided he be the Lord of the whole coast surrounding them, and not otherwise. Now, we know that is not the case with the bays just named. Both have an entrance too wide to be claimed as private seas; and independent of this, the Bay of Fundy is bounded in part by the State of Maine, a circumstance which alone would preclude all pretensions on the part of England to make it hers. I am done with this part of my subject."

This contention was entirely repudiated by Senator Seward, who was believed to have expressed the views of the Government at that time. He said (United States Case, App., p. 1257; British Case, App., p. 187) :—

"Now, Sir, this argument seems to me to prove too much. I think it would divest the United States of the harbour of Boston, all the land around which belongs to Massachusetts or the United States, while the mouth of the bay is six miles wide. It would surrender our dominion over Long Island Sound—a dominion which I think the State of New York and the United States would not willingly give up. It would surrender Delaware Bay; it would surrender, I think, Albemarle Sound, and the Chesapeake Bay; and I believe it would surrender the Bay of Monterey, and perhaps the Bay of San Francisco, on the Pacific Coast."

127 The attacks in, and outside of, Congress upon the United States Government had an unsettling effect, and an effort to get better terms from Great Britain was determined upon. (British Case, App., pp. 197, 201, 202.) The American Minister at London was consequently directed in 1853 to propose to the British Government to abstain from seizures of United States vessels when beyond three miles from shore. The British Foreign Secretary declined to agree, and in 1853 the naval instructions were continued in the same form as had been in force during the preceding years, namely (British Case, App., p. 202; United States Case, App., p. 522) :—

"to drive away, not to actually seize, beyond three miles from the shore, except in the last resort, in case of determined and contumacious encroachment in what are clearly bays of our provinces."

These orders appear to have been understood, and submitted to, by the United States fishermen; and the influence upon them of the United States naval officers, Commodores Perry and Shubrick made it unnecessary to treat any of them as contumacious.

In 1854, a new United States Secretary of State (Mr. Dobbin) seems to have reverted to the position assumed by Mr. Stevenson in 1841, as to measuring the three miles from the shores of the bays. It does not appear, however, what his position was upon the question of a line between the headlands of the smaller bays. (British Case, App., p. 203.)

"WASHINGTON" ARBITRATION, 1854.

Arbitration proceedings between the two countries took place in 1854, the legality of the seizure of the "Washington" in the Bay of Fundy being one of the questions involved. A majority of the arbitrators decided in favour of the United States claim. Mr. Upham (appointed by the United States) delivered a long opinion, holding that the Bay of Fundy was not a bay within the meaning of the treaty. Mr. Hornby (appointed by the United Kingdom) held otherwise. Mr. Bates (the Umpire) agreed with the United States Arbitrator, saying as follows (British Case, App., p. 217) :—

"It was urged on behalf of the British Government, that by coasts, bays, &c., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of the headlands is new, and
128 has received a proper limit in the convention between France and Great Britain of 2d August, 1839, in which 'it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'

"The Bay of Fundy is from 65 to 75 miles wide, and 130 to 140 miles long; it has several bays on its coast; thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The islands of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situated in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible, that the Bay of Fundy, is not a British bay, nor a bay within the meaning of the word, as used in the treaties of 1783 and 1818."

The doctrine of headlands on which Mr. Bates lays stress was, of course, not new. It is the same question as that of bays, for if bays are territorial waters then there is a right of sovereignty over the whole of them, that is, over all the space within the line drawn from headland to headland. On the question of fact he spoke with greater

authority, and on that, he found that the headlands of the Bay of Fundy were not both British. It followed, in his opinion, from that finding, that the bay was not a bay of His Majesty's dominions within the meaning of the Convention.

PERIOD 1854 TO 1866.

All debate ceased between the years 1854 and 1866. The reciprocity treaty was then in operation.

PERIOD 1866 TO 1877.

The reciprocity treaty having been terminated by the United States, the question again became the subject of diplomatic correspondence, and Mr. Seward (United States Secretary of State) in 1866 instructed Mr. Adams (United States Minister at London) to propose the appointment of a Commission with a view to agreement upon the subject of bays. The instructions were accompanied by a letter written by Mr. Richard D. Cutts, who had acted as United States Commissioner in settling an analogous difficulty under the treaty of 1854, and of whom Mr. Seward said (United States Case, App., p. 566) :—

129 “I send you a copy of a very suggestive letter from Mr. Richard D. Cutts, who, perhaps, you are aware, was employed, as surveyor for marking, on the part of the United States, the fishery limits under the reciprocity treaty. Mr. Cutts's long familiarity with that subject practically and theoretically entitles his suggestions to respect.”

In this letter Mr. Cutts said (United States Case, App., p. 569) :—

“In the opinion of this government repeatedly announced at different periods, the American fishermen have a clear right to the use of the fishing grounds lying off the provincial coasts, whether in the main ocean or in the inland seas, provided they do not approach within three marine miles of such coasts, or of the entrance to any bay, creek or harbor not more than six miles in width; and to such bays only does the renunciatory clause in the first article apply.”

The same view was formulated in 1877 by the United States Government, when, in its “Answer” laid before the Halifax Commission, it stated its contention in the following terms (British Case, App., p. 256) :—

“For the purposes of fishing, the territorial waters of every country along the sea-coast extend three miles from the low-water mark; and beyond is the open ocean, free to all. In the case of bays and gulfs, such only are territorial waters as do not exceed six miles in width at the mouth, upon a straight line measured from headland to headland. All larger bodies of water, connected with the open sea, form a part of it. And wherever the mouth of a bay, gulf, or

inlet exceeds the maximum width of six miles at its mouth, and so loses the character of territorial or inland waters, the jurisdictional or proprietary line for the purpose of excluding foreigners from fishing is measured along the shore of the bay, according to its sinuosities, and the limit of exclusion is three miles from low-water mark."

PERIOD 1887 TO 1888.

In 1887, the Committee on Foreign Relations of the United States Senate reaffirmed the same view in the following passage (British Case, App., p. 390):—

"It would seem to be clear that by the universally recognised public law among civilised nations, territorial jurisdiction of every nation along the sea is limited to 3 marine miles from its coasts, as they may happen to be, whether embracing long lines of open coast or embracing great curvatures of sea-shore, which may, and often do, almost surround vast bodies of the waters of the ocean. The phrase of the treaty, therefore, speaking of bays, creeks and harbours of His Britannic Majesty's dominions, must be understood as being such bays, creeks and harbours as by the public law of nations were and are within the territorial jurisdiction of the British Government. The committee is therefore clear in its opinion that any pretension that exclusive British jurisdiction exists, either by force of public law or of this treaty, within headlands embracing such great bodies of water, and more than 6 marine miles broad, must be quite untenable."

It is obvious that the contention thus put forward in 1866, in 1877, and in 1887 is quite inconsistent with the contention of the United States, in their Case and Counter-Case, that the three-mile line must follow the sinuosities of the coast, and it is submitted that both views are alike inconsistent with the language of the treaty and with international law.

In 1888 a convention was negotiated (known as the Chamberlain-Bayard convention). It proceeded upon the headland theory, and provided that the limits of exclusion of United States fishermen should be as follows:—

Certain named bays which measure between the headlands as follows: Bay of Chaleurs, 16 miles; Miramichi Bay, $14\frac{1}{2}$ miles; Egmont Bay, 17 miles; St. Ann's Bay, $17\frac{1}{2}$ miles; Fortune Bay, $10\frac{3}{4}$ and 11 miles; Sir Charles Hamilton Sound, $5\frac{1}{8}$ and $6\frac{1}{2}$ miles; three marine miles seaward from lines drawn across headlands of other specified bays as follows: Barrington Bay, $6\frac{1}{2}$ and $7\frac{3}{8}$ miles; Chedabucto and St. Peter's Bays, $8\frac{3}{8}$ and 9 miles; Mira Bay, Placentia Bay, $7\frac{1}{2}$ and $10\frac{3}{8}$ miles; and as to bays, creeks, or harbours (British Case, App., p. 42)—

"not otherwise specially provided for in this Treaty, such three marine miles shall be measured seaward from a straight line drawn across the bay, creek, or harbour, in the part nearest the entrance at the first point where the width does not exceed ten marine miles."

The United States Senate declined to ratify this convention, and it never became operative. Since 1888, the question has not been further discussed.

SUMMARY.

The following points are established by this evidence:—

1. The controversy as to bays originated after 1836, when the American fishermen first began to follow the mackerel into British inshore waters.

2. Great Britain in 1838, on the first occasion when the question was raised, put forward the construction of the treaty for
131 which she now contends, and she has never departed from that construction.

3. Mr. Everett, in 1845, in terms admitted that it was not the intention of the treaty that the three mile limit should be measured following the indentations of the coast, and the letter which contained this admission received the express approval of the President of the United States. This admission is wholly opposed to the contention now put forward by the United States.

4. The concession of the Bay of Fundy was concurred in by the Colonies for the reason that Mr. Everett was understood to have assented to the construction of the clause as to bays for which Great Britain contended.

5. From 1845 to 1852, the British construction was accepted and acted on. The only doubts raised by the American commanders were as to the exact location of the headlands of particular bays. From 1854 to 1866, and again from 1871 to 1885, the matter was dealt with by treaty.

INTENTION OF NEGOTIATORS.

In the Counter-Case of the United States it is asserted that (United States Counter-Case, p. 67)—

“the antecedents and surroundings of the treaty and the language used establish beyond question that the negotiators intended, in adopting the renunciatory clause, that it should apply only to the exercise of the liberties, therein mentioned, on or within three marine miles of the shore, and that the bays, creeks, and harbors referred to were those inside of such limit of three marine miles,”

and it is said that this has been shown in their Case.

His Majesty's Government is entirely unable to accept this assertion, and must join issue on every part of it. Nor has His Majesty's Government been able to discover in the Case of the United States any proof whatever in support of the statement. The point has been dealt with in the British Counter-Case, and His Majesty's Government have given the reasons why it is unable to accept the recollections of Mr. Rush, written as they were thirty-five years after the

treaty, and at a time when controversy had arisen on the point (British Counter Case, p. 46).

There is nothing whatever in the records of the negotiations themselves to support the contention of the United States (United States Case, p. 66). Reliance is placed in the United States Case on a passage in the Report of the American negotiators to their
 132 own Government. That Report was not part of the negotiations, and it is submitted that the treaty can not be construed by private communications from the negotiators of one side not communicated to the other. The passage in question was as follows (British Case, App., p. 94) :—

“ We insisted on it [the renunciation clause] with the view—1st. Of preventing any implication that the fisheries secured to us were a new grant, and of placing the permanence of the rights secured and of those renounced precisely on the same footing. 2d. Of its being expressly stated that our renunciation extended only to the distance of three miles from the coasts. This last point was the more important, as, with the exception of the fishery in open boats within certain harbors, it appeared, from the communications above mentioned, that the fishing-ground, on the whole coast of Nova Scotia, is more than three miles from the shores; whilst on the contrary, it is almost universally close to the shore on the coasts of Labrador. It is in that point of view that the privilege of entering the ports for shelter is useful, and it is hoped that, with that provision, a considerable portion of the actual fisheries on that coast (of Nova Scotia) will, notwithstanding the renunciation, be preserved.”

It is submitted—

First, that this passage is absolutely inadmissible for the purpose of construing the treaty in favour of the United States. It occurs in a Report made after the conclusion of the treaty by the American negotiators to their own Government, and never communicated to the British Government. Such a document is, it is submitted, worthless for the purpose of construing the treaty.

Second, the passage is, it is submitted, in favour of the contention of the British Government and not of the United States Government. The American negotiators were calling attention to the fact that the fisheries off Nova Scotia were situate more than three miles out to sea; while the fisheries on the coast of Labrador, to which they had access under the treaty, were close inshore. They point out that the renunciation extends only to the distance of three miles from the coasts, and claim that in this way the American fishermen get what was desired, the deep-sea fisheries off Nova Scotia, and the right of shelter, &c., under the clause in question. The passage lends no countenance to the contention of the United States as to bays, and, in fact,
 133 was cited in the Minority Report of the Committee of the Senate in 1888 as supporting Mr. Webster's contention that the treaty had given up all such bays to the British Govern-

ment. The passage in that Minority Report is as follows (British Case, App., p. 479) :—

“In view of these declarations of our plenipotentiaries, who negotiated the treaty of 1818, no censure can be due to Daniel Webster for having expressed the opinion, in what is termed his ‘proclamation’ to our fishermen, that ‘it would appear that, by a strict and rigid construction of this article’ (of the treaty of 1818), ‘the fishing vessels of the United States are precluded from entering into the bays,’ etc., and that ‘it was undoubtedly an oversight in the convention of 1818 to make so large a concession to England, since the United States had usually considered that these vast inlets or recesses of the ocean ought to be open to American fishermen, as free as the sea itself, to within three miles of the shore.”

CONCLUSION.

For these reasons Great Britain contends, in the words of the British Case, that the treaty applies to all bays on the coasts of British North America, and that the three marine miles specified in article 1 must be measured, in the case of unindented coasts, from the shore line at low tide; and, in the case of all bays, creeks, or harbours, from a line drawn across the mouths of such bays, creeks, or harbours.

QUESTION SIX.

“ COASTS ” AND “ SHORES.”

Have the inhabitants of the United States the liberty under the said article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland, which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

THE CONTENTIONS.

The question is whether United States fishermen are, under the treaty of 1818, entitled to take fish, not only on that portion of the “coast” of Newfoundland specified in article 1 of the treaty, and the “shores” of the Magdalen Islands, but also in the bays, harbours, and creeks thereof. While the treaty grants to American fishermen liberty to take fish (British Case, App., p. 30)—

“on the coasts, bays, harbours, and creeks, from Mount Joli, on the southern coast of Labrador,” &c.,

it gives liberty on the “coast” merely of Newfoundland, and on the “shores” of the Magdalen Islands. And the question is, whether the more restricted liberty in these two localities is to be construed as meaning the same as the more ample liberty on the Labrador coast.

In the case of His Majesty’s Government, attention was called to the language of the treaty to the fact that the word *coasts* is clearly used in a sense distinct from *bays, harbours, and creeks*; and the submission was offered that the concession of liberty to take fish on the “coast of Newfoundland” meant something less extensive than the concession of liberty to take fish “on the coasts, bays, harbours, and creeks of Labrador.”

The Counter-Case of the United States makes little attempt to answer this argument, not desiring (as it says) “to anticipate the printed and oral arguments.” The only suggestions offered are 136 (1) that in one phrase of the treaty the word *coast* “distinctly refers to the land adjacent to the water”; and (2) that in the British Case the admission is made that “the word ‘shores’ in Article one of the treaty is used to express the same idea as ‘coasts’ in the other parts of the Article.” The pertinence of these observations is not, however, in any way, explained; and it is not sufficiently obvious to invite reply (United States Counter-Case, p. 77).

Although reserving its argument upon the language of the treaty, the United States offers in its Counter-Case, at very considerable length, various collateral considerations in support of its view of the interpretation of the treaty.

INTENTION OF NEGOTIATORS.

Dealing with the intention of the negotiators, the Counter-Case declares that there is nothing in the records indicative of an intention to exclude United States fishermen from the bays, harbours, and creeks of Newfoundland (United States Counter-Case, p. 78).

In reply, attention is asked to certain parts of the record of those negotiations. After the treaty of 1783, the United States fishery on part of the Labrador coast increased very rapidly, while the Newfoundland coasts remained unfrequented by American fishermen. It was probably for this reason that during the negotiations which led up to the treaty of 1818, the United States made little difficulty with regard to the Newfoundland fisheries. Indeed, it would appear that the admission of United States fishermen to those waters is to be attributed more to the complacency of the British Government than to any particular desire upon the part of the United States.

In the Bagot-Monroe negotiations of 1816, the British negotiator at one time offered liberty to fish on that part of the southern Labrador coast which lies between Mount Joli and the Bay of Esquimaux. Afterwards, he offered that part of the southern coast of Newfoundland lying between Cape Raye and the Rameau Islands. And afterwards he offered both of these districts. Mr. Monroe, however, declined the offers upon the ground that neither of them had been much frequented by United States fishermen in the past or were likely to be so in the future. He made no alternative proposal (British Case, App., p. 78).

During the later negotiations of 1818, the American plenipotentiaries communicated the following to the British (British Case, App., p. 91):—

INTENTION OF NEGOTIATORS.

“The American plenipotentiaries are not authorized by their instructions to assent to any article on that subject which shall not secure to the inhabitants of the United States the liberty of taking fish of every kind on the southern coast of Newfoundland, from Cape Ray to the Rameau Islands, and on the coasts, bays, harbours, and creeks from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly, indefinitely, along the coast;”

It will be observed that the instructions made no mention of the west coast of Newfoundland; that the two districts formerly offered

by Mr. Bagot were included (although not supposed to be of any value); and that a further tract upon the Labrador coast was added to these. This additional tract on Labrador (supposed by the United States to be advantageous to them) appears to have been easily conceded by the British negotiators; and (what is more difficult to understand) the west coast of Newfoundland and the Magdalen shores, although not demanded, were apparently conceded voluntarily.

Regarding part of the Labrador coast as valuable and the Newfoundland coast as valueless, it is thus not difficult to understand why the United States plenipotentiaries, in formulating a clause for the treaty, were careful to stipulate for "the coasts, bays harbours and creeks" in Labrador, and merely for the "coasts" of Newfoundland. They thought that the fish were in one place, and not in the other. As has been previously pointed out, the United States negotiators in 1818 had in their view the cod-fishery only. Of that, there was little in the Newfoundland bays. There is, indeed, none on the west coast of the island, and on the south coast it is a purely winter fishery and therefore not available for United States fishermen (United States Counter-Case, p. 89).

NEGOTIATIONS OF 1823.

The United States Counter-Case makes long reference to the negotiations of 1823 with reference to the French shore, and claims that in those negotiations Great Britain failed to point out the exact nature of United States rights. In reply, His Majesty's Government asks attention to the fact that, in these negotiations, the issue was entirely between the British and the United States Governments on one side, and the French Government on the other. The
 138 situation as between Great Britain and the United States was a matter of absolutely no importance, and, if for the purposes of the controversy with France, their interests were assumed to be the same, it was because they were sufficiently so to unite them in opposition to the French claim to exclude them both from the coasts, as well as the bays, of the part of Newfoundland under discussion.

ALLEGED ACQUIESCENCE.

In another part of its Counter-Case, the United States says that the contention of His Majesty's Government was never raised until 1905, although (United States Counter-Case, p. 75)

"the United States has always asserted the right of the American fisherman to take fish in the waters referred to, and American fishermen have, ever since the treaty was made, openly exercised their right to take fish in these waters without objection or interference by the Newfoundland Government,"

The contention was made at the time when United States fishermen were thrown back on their bare rights under the treaty of 1818 by the Newfoundland legislation of 1905, which prohibited the purchase of fish by American fishermen.

NON-USER OF BAYS.

In support of the foregoing statements as to the non-occupation of the Newfoundland inshore waters by American fishermen attention is called to the letter of Mr. Labouchere (Colonial Secretary) to the Governor of Newfoundland (16th January, 1857), in which, referring to the claim of the French on the west coast of Newfoundland, he said (United States Counter-Case, App., p. 252, 254):—

“Whether the terms conveying the French right were logically equivalent or not to the term ‘exclusive’ they were at all events practically so; since English fishermen could not interrupt French fishermen by ‘competition’ it was of little importance whether they had in theory ‘a concurrent’ right, since they would always be warned off by the French.

* * * * *

“Now on the assumption that the French right on that coast is exclusive (which, as has been said, must be practically the case) the Americans could acquire no right, under this convention of 1818, during the period of the year occupied by the French fishery, and it is believed that in point of fact no claim to interfere with the French has ever been sustained by Americans; nevertheless Her Majesty’s Government are of opinion, in order to preserve consistency with the language of the convention of 1818, it was necessary to
139 declare the French right on points between Cape Ray and the Quirpons to be exclusive ‘against British subjects,’ in order to leave no semblance of interference with nominal (although not in fact exerciseable) rights on the part of the United States.”

Attention is also asked to the remarks of the Hon. Mr. Dwight Foster during the Halifax Arbitration. Referring to the fact that the evidence had shown that there was no fishing in the waters which might, or might not, be thought to be “bays,” he said (British Counter-Case, App., p. 183, 184):—

“The headland question, therefore, gentlemen, I believe may be dismissed as, for the purpose of this inquiry wholly unimportant,”

* * * * *

“Of territorial fishing in Newfoundland waters, there is hardly any evidence to be found since the first day of July, 1873, when the fishery clauses of the Treaty of Washington took effect, with one exception, that I will allude to hereafter. There is certainly no cod-fishing done by our people in the territorial waters of Newfoundland; none has been proved, and there is no probability that there ever will be during the period of the treaty or afterward. The American cod fishery is everywhere deep sea fishing. There is a little evidence of two localities in which a few halibut are said to have been taken in

Newfoundland waters—one near Hermitage Bay, and one near Fortune Bay. But the same evidence that shows that it once existed shows that it had been exhausted and abandoned before the Treaty of Washington was made.”

* * * * *

“There has been a little evidence that occasionally when our vessels go into harbors to purchase bait at night, some of the men will jig a few squid, when they are waiting to obtain bait.

“All the evidence shows that they go there not to fish for bait, but to buy it. It shows also that when they are there for that purpose, the crews of the vessels are so much occupied in taking on board and stowing away the fish bought for bait that they have no time to engage much in fishing; but one or two witnesses have spoken of a little jigging for squid by one or two men when unoccupied at night. As to the rest, all the fishing in the territorial waters of Newfoundland is done by the inhabitants themselves.

“The frozen-herring trade, which was the ground of compensation chiefly relied upon in the Newfoundland case, has been completely proved to be a commercial transaction. The concurrent testimony of the witnesses on both sides is, that American fishermen go there with money, they do not go there provided with the appliances for fishing, but with money and with goods. They go there to purchase and to trade, and when they leave Gloucester, they take out a permit to touch and trade, that they may have the privileges of trading-vessels.

* * * * *

140 “So much for the inshore halibut fishery. I will, however, before leaving it, refer to the statement of one British witness, Thomas R. Pattilo, who testified that occasionally halibut may be caught inshore, as a boy may catch a codfish off the rocks; but, pursued as a business, halibut are caught in the sea, in deep water. ‘How deep do you say?’ ‘The fishing is most successfully prosecuted in about 90 fathoms of water, and, later in the season, in as much as 150 fathoms (British Counter-Case, App., p. 186).’

“So much for the inshore halibut fishery; and that brings me to the inshore cod fishery, as to which I am reminded of a chapter in an old history of Ireland that was entitled ‘On Snakes in Ireland,’ and the whole chapter was ‘There are no Snakes in Ireland.’ So there is no inshore cod fishery pursued as a business by United States vessels anywhere. It is, like halibut-fishing, exclusively a deep-sea fishing. They caught a whale the other day in the harbor of Charlottetown, but I do not suppose our friends expect you to assess in this award against the United States any particular sum for the inshore whale fishery. There is no cod fishery or halibut fishery inshore, pursued by our vessels, any more than there is inshore whale fishery. We know and our witnesses know where our vessels go. If they go near the British shores at all they go to buy bait, and leave their money in payment for the bait.”

Mr. Trescott said (British Counter-Case, App., p. 187):—

“With regard to the fisheries. The fisheries with which the Treaty of 1871 is concerned are the cod, the herring, the mackerel, and hake, the haddock, and halibut fisheries, within the three-mile limit. For

the purposes of this argument, there will be, I think, a general agreement that we can dismiss the hake, haddock, and halibut fisheries. It is admitted, also, that the cod fishery is essentially a deep-sea fishery, and does not, therefore, come within the scope of your examination, especially as the question of bait and supplies, which alone connected it with this discussion, has been eliminated by your former decision."

"We have left, then, only the herring fishery and the mackerel fishery. As to the herring fishery, I shall say but very few words. The herring fishery on the shores of the Magdalen Islands we claim of right—a few scattering catches elsewhere are not appreciable enough to talk about; and we have, therefore, only the herring fisheries of Newfoundland and Grand Manan. The former is essentially a frozen-herring business, and I do not believe there exists a question that this business, both at Newfoundland and Grand Manan, is entirely a mercantile business, a commercial transaction, a buying and selling, not a fishing. The testimony on this subject is complete, and is confirmed by Mr. Babson, the collector of the port of Gloucester, who has told you that the Gloucester fleet, the largest factors in this business, take out licenses to touch and trade, when they go for frozen herrings, thus establishing the character of their mercantile voyage.

141 "The only open question, then, as to the herring fishery, is the fishery for smoked and pickled herring at Grand Manan, and in the Bay of Fundy, from Latite to Lepreaux, and whether that is conducted by United States fishermen within the three-mile limit; a question, it seems to me, very much narrowed when you come to consider that from Eastport, in Maine, to Campobello is only a mile and a half, and from Eastport to Grand Manan is only six or seven miles."

Mr. Dana said (British Counter-Case, App., p. 188):—

"Your honours will also observe that until 1830 the mackerel fisheries were unknown. There was no fishery but the cod fishery. The cod fisheries were all the parties had in mind in making the Treaty of 1818, and to this day, as you have observed from some of the witnesses, 'Fishing,' by the common speech of Gloucester, fishing means, *ex vi termini*—cod-fishing is one thing and 'mackereling' is another.

* * * * *

"I suppose this tribunal is satisfied that we do not catch cod within three miles of Newfoundland; that we do not catch even our bait there, but that we buy it."

Until 1905, therefore, the relation between Newfoundland and United States fishermen was that of vendors and purchasers of frozen herring and fresh bait. If the purchasers did a little jigging while in the harbours completing their purchases, such action was not of sufficient importance to raise international controversy.

It is submitted that non-assertion of rights which are not being substantially invaded cannot justly be referred to as evidence of non-existence of those rights.

QUESTION SEVEN.

COMMERCIAL PRIVILEGES.

Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in article 1 of the treaty of 1818 entitled to have for those vessels, when duly authorised by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

SCOPE OF THE QUESTION.

In the discussions which have taken place on this subject, attempts have been made by the United States to support the claim to commercial privileges upon various grounds: the treaty of 1818; the reciprocal arrangements of 1830; the treaty of 1871; the comity of nations. But the question referred to the Tribunal is now agreed, by both sides, to be confined to the treaty of 1818. The position of the United States is stated in their Case in the following terms (United States Case, p. 249):—

“The position of the United States with reference to Question 7 is that it is raised only in relation to the provisions of Article I of the treaty of 1818, which this Tribunal is called upon to interpret, and that, so far as such provisions bear upon the question, the inhabitants of the United States, whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I aforesaid, are entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally; and the United States requests the Tribunal to answer and decide this Question accordingly.”

The question, therefore, is agreed to be, Whether by reason of the treaty of 1818, United States fishing-vessels are entitled, upon the treaty coasts, to the commercial privileges which by agreement or otherwise are accorded to United States trading-vessels?

The United States Counter-Case, however, itself supplies
144 the answer to this question, and does away with the necessity for further argument. On p. 105 there is the following admission (United States Counter-Case, p. 105):—

“It is agreed on both sides that Article I of that treaty relates to fishing, and not to commercial privileges; and the United States does not claim that the treaty of 1818 confers general commercial privi-

leges on the treaty coasts upon the inhabitants of the United States, or upon their vessels, whether they are trading or fishing vessels."

It is admitted, therefore, that Question 7 relates only to the construction of article 1 of the treaty, and that article 1 does not confer the rights which have been claimed by the United States.

On these admissions the Tribunal is asked to give judgment in favour of Great Britain, and to answer the question referred to them in the negative.

NEW QUESTION PROPOSED BY UNITED STATES.

The United States now desire to refer another and a different question to the Tribunal. In its Counter-Case it says (United States Counter-Case, p. 106) :—

"As understood on the part of the United States, therefore, the Question which the Tribunal is called upon to determine is whether or not Article I of this treaty should be interpreted as meaning that the use by the inhabitants of the United States of their vessels for fishing under the treaty prevents them from having for those vessels the commercial privileges accorded by agreement or otherwise to trading vessels generally, when the vessels so used are duly authorized by the United States in that behalf."

It is not alleged that any right exists to these privileges under any other convention or agreement. It follows, therefore, from the admission that the treaty of 1818 confers no privileges, that the grant of them is a matter for Great Britain to concede or withhold at her pleasure.

The question submitted to the Tribunal by the treaty of arbitration is, whether Americans are "entitled" to certain privileges, that is, whether the treaty confers any right to those privileges. The question which the United States desire to substitute is, whether the treaty so operates as to prevent Americans from having certain privileges, if Great Britain should choose to grant them.

There is nothing in the treaty which would prevent Great Britain from opening her colonial ports for commercial purposes to Americans fishing under the treaty if she should so elect; on the other hand, she is under no obligation to do so. Indeed, if there were an express clause of prohibition in the treaty there would equally
 145 be nothing to prevent Great Britain waiving the benefit of it, if she should so desire. The matter is one wholly within her discretion, and is for her alone to decide.

But His Majesty's Government have to point out that this is not a question which has been referred to this Tribunal, or, indeed, which could be so referred. There is no point of law or of fact in dispute, and His Majesty's Government protests against any

attempt to deal with the question which the United States Counter-Case endeavours to substitute for that submitted by the agreement for arbitration.

BRITISH OBJECTIONS.

The grant of trading facilities is a concession which could not, in any view, be fairly asked for vessels taking advantage of the privileges conferred by the treaty of 1818. Those vessels have been granted exceptional rights in British waters for the purpose of fishing; rights which are never given to traders. They are allowed to hover on the British coasts at their will; they clear for no particular port; they proceed on no definite voyages. Lord Bathurst, in explaining the effect of the treaty to the Governor of Newfoundland in 1819, observed that any attempt to carry on trade under the pretence of exercising the rights conferred by the convention would be in every respect at variance with its stipulations. And the observation holds good to-day. The privileges given for the purpose of fishing cannot fairly be claimed for the purposes of trade. (British Case, App., p. 99.)

It is quite obvious that there are considerations of great gravity which may properly lead Great Britain to refuse to fishing vessels those trading privileges which she voluntarily concedes to other vessels. Infraction of the customs law would, with great difficulty, be prevented if the fishing vessels were allowed to trade.

But it is unnecessary to discuss this, and other reasons which, in the opinion of His Majesty's Government, would render it undesirable that such trading facilities should be conceded to fishing-vessels, inasmuch as the matter is one wholly for Great Britain to determine.

The fact that a fishing-vessel is licensed to trade by the United States Government can have no bearing on the question submitted by the agreement for arbitration. A licence from the United States

Government cannot give a right which the treaty does not
146 confer. A claim on the part of that Government to give commercial privileges in British waters, to vessels not entitled to those privileges under British law, would be wholly untenable. In the absence of any treaty stipulation, the matter is one for Great Britain alone to determine.

CONCLUSION.

His Majesty's Government submits that the whole matter is therefore concluded, and that there is nothing further to be discussed. But should the Tribunal desire any further information or argument they are respectfully referred to the British Case and Counter-Case.

147 NOTE ON THE TRADE RELATIONS BETWEEN GREAT BRITAIN AND THE UNITED STATES.

It has been thought convenient to present a short review of the statutes and other political documents affecting the trade relations between Great Britain and the United States down to 1830, from which review the following conclusions will emerge:—

1. That from a period as early as the Stuart Kings the colonial policy of Great Britain (as well, indeed, as of every other colony-owning Power) was one of exclusion from colonial ports of all foreign shipping.

2. That by the separation from Great Britain of the thirteen American colonies, the United States shipping fell under the general prohibition of foreign access to the ports of the remaining British North American colonies.

3. That during the negotiations which led up to the treaty of 1818, various proposals were made for the opening to a very modified extent of the colonial ports, but nothing was agreed to.

4. That both prior and subsequent to the treaty the United States adopted retaliatory legislation. On 27th May, 1820, Mr. John Quincy Adams (United States Secretary of State) referred to the “counter-prohibitions” of the United States having, by its last statute, been “rendered complete” (British Case, App., p. 101).

5. That other negotiations were undertaken at various periods, but that until 1830 (with a slight interlude in 1822) Great Britain steadily declined to break in upon its colonial system.

1660—The most important of the many British statutes having for their avowed object (British Case, App., p. 514)—

“the increase of shipping and encouragement of the navigation of this nation, wherein, under the good providence and protection of God, the wealth, safety and strength of this Kingdom is so much concerned;”

was that of 12 Charles II, c. 18, the first clause of which provided—

“That from and after the first day of *December* one thousand six hundred and sixty, and from thence forward, no goods or commodities whatsoever shall be imported into or exported out of any lands, islands, plantations or territories to His Majesty belonging or in his possession, or which may hereafter belong unto or be in possession of His Majesty, his heirs and successors, in *Asia, Africa, or America*, in any other ship or ships, vessel or vessels whatsoever, but in such ships or vessels as be truly and without fraud belong only to the people of *England or Ireland*, Dominion of *Wales* or town of
148 *Berwick upon Tweed*, or of the built of and belonging to any of the said lands, islands, plantations or territories, as the proprietors and right owners thereof, and whereof the Master and three fourths of the Mariners at least are *English*;

In 1699 a British statute (10 & 11 Wm. III, c. 25) provided (British Case, App., p. 525)—

“that no alien or stranger whatsoever (not residing within the kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*) shall at any time hereafter take any bait, or use any sort of trade or fishing whatsoever in *Newfoundland*, or in any of the said islands or places abovementioned.”

These statutes were in force in 1783, and consequently, by the erection of the United States into an independent sovereignty, their effect was to exclude all United States vessels from British ports in North America (British Counter-Case, App., p. 133).

1782-3.—During the negotiations which preceded the treaty of peace in 1783, attempts were made to agree upon the establishment of trade relations between the United States and the British colonies in North America; but agreement could not be arrived at.

1786.—After the peace, the British statute (26 Geo. III, c. 26) provided (British Case, App. pp. 555, 559):—

“That it shall not be lawful for any person or persons, residing in, or carrying on fishery in the said Island of *Newfoundland*, or on the banks thereof, there to sell, barter, or exchange any ship, vessel, or boat, of what kind or description soever, or any tackle, apparel, or furniture, used, or which may be used by any ship, vessel, or boat; or any seines, nets, or other implements or utensils, used, or which may be used, in catching or curing fish, or any kind of bait whatsoever, used, or which may be used, in the catching of fish; or any kind of fish, oil, blubber, seal skins, peltry, fuel, wood, or timber, to or with any person or persons whatsoever, other than the subjects of His Majesty, his heirs and successors.”

This statute (as well as that of 1699) was in force at the date of the 1818 treaty.

1794.—A treaty was agreed to between Great Britain and the United States, which stipulated that (British Case, App., p. 20)—

“There shall be between all the dominions of His Majesty in Europe and the territories of the United States a reciprocal and perfect liberty of commerce and navigation.”

It also provided (Ibid., p. 19)—

“that it shall and may be lawful, during the time hereinafter limited, for the citizens of the United States to carry to any of His Majesty’s islands and ports in the West Indies from the United States, in their own vessels, not being above the burthen of seventy tons, any
149 goods or merchandises, being of the growth, manufacture, or
produce of the said States, which it is or may be lawful to
carry to the said islands or ports from the said States in British vessels;”

No agreement could be reached by which United States vessels would be enabled to enter the ocean ports of British North America.

Indeed, the treaty carefully provided for their exclusion (British Case, App., p. 16) :—

“It is agreed that it shall at all times be free to His Majesty’s subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America, (the country within the limits of the Hudson’s Bay Company only excepted,) and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other. But it is understood that this article does not extend to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks of His Majesty’s said territories; nor into such parts of the rivers in His Majesty’s said territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulation as shall be established to prevent the possibility of any frauds in this respect.”

1814.—The war of 1812–4 was terminated by the treaty of 1814, which contained no provision upon the subject of commercial relations (*Ibid.*, p. 25).

1815.—The treaty of 1815 recited the desire of Great Britain and the United States (*Ibid.*, p. 29)—

“to regulate the commerce and navigation between their respective countries, territories, and people, in such manner as to render the same reciprocally beneficial and satisfactory,”

But the reciprocity was confined to—

“the territories of the United States of America and all the territories of His Britannic Majesty in Europe,”

And it was expressly provided that—

“The intercourse between the United States and His Britannic Majesty’s possessions in the West Indies and on the continent of North America shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights with respect to such an intercourse.”

The treaty was to expire at the end of four years. It was extended by the treaties of 1818 and of 1827.

150 In 1817, the United States adopted a statute (1st March, c. 31) which provided (British Case, App., p. 783)—

“That after the thirtieth day of September next no goods, wares, or merchandise, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture; or from which such goods, wares, or merchandise, can only be, or most usually are, first shipped for trans-

portation: *provided, nevertheless*, that this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt, a similar regulation."

1818.—The United States adopted another statute (18th April, c. 70), which provided as follows (British Case, App., p. 784):—

"that from and after the thirtieth of September next, the ports of the United States shall be and remain closed against every vessel owned wholly or in part by a subject or subjects of His Britannic Majesty, coming or arriving from any port or place in a colony or territory of His Britannic Majesty that is or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; and such vessel, that, in the course of the voyage, shall have touched at, or cleared out from, any port or place in a colony or territory of Great Britain, which shall or may be, by the ordinary laws of navigation and trade aforesaid open to vessels owned by citizens of the United States, shall, nevertheless, be deemed to have come from the port or place in the colony or territory of Great Britain, closed as aforesaid, against vessels owned by citizens of the United States, from which such vessel cleared out and sailed before touching at, and clearing out from, an intermediate and open port or place as aforesaid; and every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter, the same, in violation of this Act, shall, with her tackle, apparel, and furniture, together with her cargo on board such vessel, be forfeited to the United States."

Referring to this statute, Mr. John Quincy Adams (United States Secretary of State), in a letter (21 May 1818) to Mr. Rush (United States Ambassador at London), said (British Case, App., p. 81):—

"It meets the British prohibitive colonial system by direct and countervailing prohibition, to commence from and after the 30th of September next. The vote upon its passage in the Senate, where it originated, was all but unanimous, and in the House of Representatives the opposition to it amounted only to fifteen or sixteen votes.

"Although no formal communication of this law to the British Government will be necessary, it may naturally be expected that it will be noticed in your occasional conversations with Lord 151 Castlereagh. He will doubtless remember, and may be reminded of, the repeated efforts made by this Government to render it unnecessary by an amicable arrangement, which should place on an equitable footing of reciprocity the intercourse between the United States and the British colonies; he will remember the repeated warnings given, that to this result it must come, unless some relaxation of the British prohibitions should take place; and his own equally repeated admissions, that the exercise of the prohibitive right on the part of the United States would be altogether just, and would give no dissatisfaction whatever to Great Britain.

"You are, nevertheless, authorised to assure him that the President assented to this measure with great reluctance, because, however just in itself it may be, its tendencies cannot but be of an irritating character to the interests which it will immediately affect, and because

his earnest desire is to remove causes of irritation, and to multiply those of a conciliatory nature between the two countries. Such has manifestly been, on both sides, the effect of the equalising and reciprocal provisions of the convention of July, 1815; and such, he has no doubt, would be the effect of the extension of its principles to the commercial intercourse between the United States and the British colonies in the West Indies and on this continent; and you are authorised again to repeat the offer of treating for a fair and equitable arrangement of this interest."

Mr. Rush's reply (25th July, 1818) contains the following (referring to a conversation with Lord Castlereagh) (British Case, App., p. 82):—

"I entered next upon the subject of the commercial relations between the two countries. Remarking upon the change produced in them by the Prohibitory Act of the last session of Congress, now soon to commence its operation, I observed that I had it in charge to say that the President had yielded his assent to that Act with reluctance; for that, however just, its tendencies might be of an irritating nature to the individual interests that it would effect on both sides, whilst it was his constant desire to give efficacy to measures mutually more beneficial and conciliatory. It was, therefore, that I was once more authorised and instructed to propose to this Government the negotiation of a general treaty of commerce.

* * * * *

"His Lordship asked what he was to understand by a general treaty of commerce. I replied, a treaty that should lay open, not a temporary or precarious, but a permanent intercourse with their West India islands and North American colonies to the shipping of the United States, as often before proposed, but which, after the recent refusals, it might seem almost unnecessary again to bring into view, were it not that other objects of interest to both nations were now associated with it in a way to clothe the proposition with a new aspect.

152 "He answered that the British Government would certainly be willing to enter upon a negotiation on the commercial relations of the two countries, but that he had no authority to say that the colonial system could be essentially altered; broken down it could not be. I said, that if it was not to be departed from, or in no further degree than the four articles had imported, as those articles had already been rejected, it did not appear to me that any advantage would be likely to arise from going into the negotiation. He replied that he was not prepared to answer definitely upon all or any of the points, but would lay them before the Cabinet, and let me know the result. He professed earnestly, in the course of the conversation, the desire which this Government had to see the commerce of the two countries stand upon the best footing of intercourse, the stake to each being so great, and promising, with the growth of the United States, to be so much greater.

"In the event of a negotiation, upon the grounds I had explained, not being opened, he asked if I could inform him what the intentions of my Government were relative to the commercial intercourse between the two countries, it being, for obvious reasons, desirable soon

to know. Here I did not hesitate to announce that, in such an event, which I still hoped would not be the case, it was willing simply to renew the existing convention of 1815, thus keeping this instrument distinct from all other questions of a commercial nature, if the British Government preferred it. This communication, I thought, he received with evident satisfaction. He remarked that it would rescue the commercial relations from all danger of a chasm, and made known, in immediate reply, the readiness of his Government to acquiesce in such a course.

"On the 22d I received a note from him requesting to see me again at the Foreign Office on the 23d. I was there accordingly. Mr. Robinson, who is now a member of the Cabinet, as well as president of the Board of Trade, was present. It was the first occasion upon which any third person had been associated with Lord Castlereagh at any of our official interviews.

"His lordship commenced by saying that he had laid my proposals before the Cabinet, and that it had been agreed to enter upon the general negotiation; that is, one which should embrace all the points I had stated. In relation to the great commercial question, he begged I would understand that the British Government did not pledge itself beforehand to a departure from its colonial system in a degree beyond what it had already offered; but that it sincerely was desirous to make the attempt, and unequivocally wished to bring the whole commercial relations of the two countries into view, willing to hope, though abstaining from promises, that some modification of that system, mutually beneficial, might be the result of frank and full discussions renewed at the present juncture. I replied that I knew my Government would hear this determination with great satisfaction; that it would cordially join in the hope that the new effort might be productive of advantage to both countries, and strengthen the ties of good intercourse that should unite them."

153 The foregoing extracts exhibit the attitudes, in 1818, of the respective countries towards the subject of commercial relations. It will be observed that the object sought for by the United States was the renewal of the treaty of 1815, under which no United States vessel was permitted to enter any of the ocean ports of the British possessions in North America.

1818 Negotiations.—It was under these circumstances that the fishery negotiations of 1818 commenced—or rather that the negotiations which had been commenced in 1815 were resumed. And the nature of the instructions issued by Mr. John Quincy Adams to the United States commissioners is sufficiently indicated by the following (British Case, App., p. 83):—

"With regard to the commercial convention of the 3d July, 1815, you have already been informed that the President is willing that it should be continued without alteration for a further term of eight or ten years. We had flattered ourselves, from the liberal sentiments expressed by Lord Castlereagh in Parliament, and from various other indications, that the British Cabinet would have been now prepared to extend the principles of the convention to our commercial

intercourse with their colonies in the West Indies and North America; but, from the report of two conferences between Mr. Rush and Lord Castlereagh, since received, it appears that our anticipations had been too sanguine, and that, with regard to our admission into their colonies, they still cling to the system of exclusive colonial monopoly.

“Our Navigation Act, passed at the last session of Congress, is well calculated to bring this system to a test by which it has not hitherto been tried; and if the experiment must be made complete, so that the event shall prove to demonstration which of the two countries can best stand this opposition of counter-exclusions, the United States are prepared to abide by the result. Still, we should prefer to remove them at once, if for no other reason than that it would have a tendency to promote good humour between the two countries. We wish you to urge this argument upon the British Cabinet; to remind them of the principles avowed by Lord Castlereagh in Parliament, to which I have before referred, and of their precise bearing upon this question.”

During the negotiations, an endeavour was made by the United States commissioners to induce the British commissioners to agree to a modification of the British colonial system. No agreement could be arrived at. At the fifth conference the British commissioners submitted the following projet (British case, App., p. 90):—

“ARTICLE D.

“British vessels shall have liberty to export, from any of the ports of the United States to which any foreign vessels are permitted to come, to the ports of Halifax, in His Britannic Majesty’s province of Nova Scotia; to the port of St. John’s, in His Britannic Majesty’s province of New Brunswick, and to any other port within the said provinces of Nova Scotia or New Brunswick, to which vessels
154 of any other foreign nation shall be admitted, the following articles, being of the growth, produce, or manufacture of the United States, viz: scantling, planks, staves, heading-boards, shingles, hoops, horses, neat cattle, sheep, hogs, poultry, or live stock of any sort, bread, biscuit, flour, pease, beans, potatoes, wheat, rice, oats, barley, or grain of any sort, pitch, tar, turpentine, fruits, seeds, and tobacco.

“And vessels of the United States shall, in like manner, have liberty to import from any of the aforesaid ports of the United States into any of the aforesaid ports within the said provinces of Nova Scotia and New Brunswick, the above-mentioned articles, being of the growth, produce, or manufacture of the United States.

“British vessels shall also have liberty to import from any of the aforesaid ports within the provinces of Nova Scotia and New Brunswick, into any of the aforesaid ports of the United States, gypsum and grindstones, or any other articles, being of the growth, produce, or manufacture of the said provinces, and, also, any produce or manufacture of any part of His Britannic Majesty’s dominions, the importation of which into the United States shall not be entirely prohibited.

"And vessels of the United States shall have liberty to import from the said provinces to the said United States, slates, gypsum, and grindstones, or any other article, being of the growth, produce, or manufacture of any part of His Britannic Majesty's dominions, the importation of which into the United States from any other place shall not be entirely prohibited.

"The vessels of either of the two parties employed in the trade provided for by this article shall be admitted in the ports of the other party, as above mentioned, without paying any other or higher duties or charges than those payable in the same ports by the vessels of such other party. The same duties shall also be paid, respectively, in the dominions of both parties, on the importation and on the exportation of the articles which may be imported or exported, by virtue of this article; and the same bounties shall also be allowed on the exportation thereof, whether such importation or exportation shall be in vessels of the United States or in British vessels."

At the sixth conference the United States commissioners (United States Case, App., p. 314)—

"stated that they could not take into consideration the article respecting the intercourse with Nova Scotia and New Brunswick, unconnected with the subject of the British West Indies."

At the eighth conference a further proposal was made by the British commissioners with reference to the West Indies, but it was not agreed to. And the only clause in the treaty relating to commercial relations is as follows (British Case, App., p. 31):—

"Art. 4. All the provisions of the convention 'to regulate the commerce between the territories of the United States and of His Britannic Majesty,' concluded at London on the third day of July, 155 in the year of our Lord one thousand eight hundred and fifteen, with the exception of the clause which limited its duration to four years, and excepting, also, so far as the same was affected by the declaration of His Majesty respecting the Island of St. Helena, are hereby extended and continued in force for the term of ten years from the date of the signature of the present convention, in the same manner as if all the provisions of the said convention were herein specially recited."

The projet submitted by the British commissioners at the fifth conference deserves notice. Besides conceding liberties to fish and to dry and cure fish, the draft contained the following (United States Case, App., pp. 312, 313):—

"And it is further agreed that nothing contained in this article shall be construed to give to the inhabitants of the United States any liberty to take fish within the rivers of His Britannic Majesty's territories, as above described; and it is agreed, on the part of the United States, that the fishermen of the United States resorting to the mouths of such rivers shall not obstruct the navigation thereof, nor wilfully injure nor destroy the fish within the same, either by setting nets across the mouths of such rivers, or by any other means whatever.

* * * * *

"It is further well understood that the liberty of taking, drying, and curing fish, granted in the preceding part of this article, shall not be construed to extend to any privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits hereinbefore assigned for the use of the fishermen of the United States, for any of the purposes aforesaid.

"And in order the more effectually to guard against smuggling, it shall not be lawful for the vessels of the United States, engaged in the said fishery, to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of the fishery, or the support of the fishermen whilst engaged therein or in the prosecution of their voyages to and from the said fishing grounds. And any vessel of the United States which shall contravene this regulation may be seized, condemned, and confiscated, together with her cargo."

In their reply, the United States commissioners offered no objection whatever to the British proposal relative to the "carrying on trade." It was at the same fifth conference that the British commissioners made proposals for very limited commercial intercourse between the countries—proposals which at the next conference the United States commissioners rejected.

In the report to their Government by the British commissioners there is the following (British Case, App., p. 87):—

"With respect to the colonial trade it appears to us only necessary to communicate to your Lordship, that while they admitted the importance of the trade to the United States (attended as they
156 stated themselves to believe, with corresponding advantages to Great Britain) they stated their willingness rather to forgo entering into any arrangement on this subject, than depart from the principle upon which the projet of their present article was framed, namely that however limited that trade might be, it should within those limits be equally open to America and to Great Britain—They further stated that they could not consent to put the intercourse between Bermuda Turk's Island Nova Scotia and New Brunswick and the United States upon a different footing from that upon which the West India trade (properly so called) should ultimately stand. In reply to an observation made by us, that so far as regarded the trade between Bermuda, Turks Island and Nova Scotia and the United States, the effect of the article as explained by them, would be to place Great Britain on a worse footing than she stood at present; they frankly stated that, that was certainly their intention, and that there could be no doubt, that the restrictive system applied by the recent law of the United States to the trade between the United States and the British West Indies, would be applied in a future session, to that carried on with Bermuda Turk's Island & Halifax, it being as they stated, the policy of the American Government to counteract by these means the system adopted by Great Britain of defeating, through the medium of those ports of entrepot, the general prohibitions of the United States against the West India intercourse."

The report to their Government of the American commissioners (20th October, 1818) contained a long account of the negotiations; part of it is as follows (British Case, App., p. 95) :—

“Commercial intercourse. The subject of the intercourse with the West Indies was fully discussed, and, not thinking ourselves authorised to accede to the last proposals of the British plenipotentiaries, which are annexed to the protocol of the eighth conference, an entry was made that we had taken them *ad referendum* to our Government. The negotiation being kept open, in that respect, we agreed, in conformity with our instructions, to an article continuing in force for ten years the commercial convention of 1815. It was fully understood, on both sides, that if no agreement should be ultimately concluded with respect to the colonial intercourse, no ground of complaint would arise on account of any restrictive measures whatever that the United States might adopt on that subject; and we stated, expressly, that such measures would, in all probability, be extended to the intercourse with Bermuda and with the British northern colonies; that, if the direct trade with the West Indies was not allowed, the United States would not be disposed to suffer it to be carried on through any other intermediate British port.”

The character of the treaty was indicated in a letter of instructions sent by Lord Bathurst to the Governor of Newfoundland (21st June, 1819), in which he said (British Case, App., p. 99) :—

157 “You will in the first place observe that the privilege granted to the citizens of the United States is one purely of fishery and of drying and curing fish within the limits severally specified in the convention. It is the pleasure of His Royal Highness that this privilege as limited by the convention should be fully and freely enjoyed by them without any hindrance or interference. But you will at the same time remark that all attempts to carry on trade or to introduce articles for sale or barter into His Majesty’s possessions under the pretence of exercising the rights conferred by the convention is in every respect at variance with its stipulations.”

1819.—The United States declined to accede to the proposals made by the British treaty commissioners above referred to. A counter-proposal was made by the United States, but it was not agreed to. A letter of Mr. Rush (United States Ambassador at London) to the United States Secretary of State (17th September, 1819) shows by what distance the conflicting views were separated. Referring to an interview with Lord Castlereagh, Mr. Rush said (British Case, App., p. 98) :—

“Our proposals, therefore, could not be accepted. Such were his remarks.

“I observed, that to break down the system was not our aim. All that we desired was, that the trade, as far as it was gone into at all, should be open to the vessels of both nations upon precisely equal terms. If the system fell by such an arrangement, it was as an incident, and only showed how difficult it seemed to render its long continuance consistent with a proper measure of commercial justice towards us.

“So broad and unequivocal was his Lordship’s refusal, that it seemed almost superfluous to ask him to be more particular; yet, perceiving in me a wish to be made acquainted rather more specifically with the objections, he said that he would not scruple to mention them without, however, entering into details, for which he was not prepared, and which had been amply unfolded on both sides during the negotiation this time twelvemonth. The objections were threefold.” &c.

Mr. Rush detailed the rest of Lord Bathurst’s exposition; gave his own reply; and concluded as follows (British Case, App., p. 101) :—

“His lordship did not hold to such views, and the conversation was not prolonged. It is proper for me to add, that he requested it to be understood that, whilst our proposals were declined, it was altogether in a friendly spirit, and that no complaint would be made, as had frequently been intimated, at our resorting to any just and rightful regulations of our own which we might deem necessary to meet theirs, in relation to these islands. I rejoined, that I thought it probable that some such regulations would, before long, in addition to those existing, be adopted.

“Having earnestly endeavoured to fulfill all my instructions, in their full spirit of anxiety for a different result upon this subject, my duty appears now to have arrived at its close.”

158 1820.—Negotiations being thus terminated, the United States Congress passed a statute (15th May) supplementary to that of the 18th April, 1818 (above), by which it was provided (British Case, App., p. 784)—

“that from and after the thirtieth day of September next, the ports of the United States shall be and remain closed against every vessel owned wholly, or in part, by a subject or subjects of His Britannic Majesty, coming, or arriving by sea, from any port or place in the province of Lower Canada, or coming or arriving from any port or place in the province of New Brunswick, the province of Nova Scotia, the islands of Newfoundland, St. Johns or Cape Breton, or the dependencies of any of them, the islands of Bermuda, the Bahama Islands, the islands called Caicos, or the dependencies of any of them, or from any other port or place in any island, colony, territory, or possession, under the dominion of Great Britain in the West Indies, or on the continent of America, south of the southern boundary of the United States, and not included within the Act to which this Act is supplementary. And every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter, the same, in violation of this Act, shall, with her tackle, apparel, and furniture, together with the cargo on board such vessel, be forfeited to the United States.”

It will be observed that this statute includes fishing-vessels as well as all other vessels, and is specifically applicable to all the British North American colonies. In transmitting a copy of it to Mr. Rush for delivery to the British Government, Mr. John Quincy Adams

(the United States Secretary of State) said (British Case, App., p. 101):—

“The subject to which that Act relates has so recently and so fully been discussed between the two Governments, that it may be superfluous, though it cannot be unseasonable, to assure the British Cabinet, as you are authorised to do, that it was adopted with a spirit in nowise unfriendly to Great Britain; and that, if at any time the disposition should be felt there to meet this country by arrangements founded on principles of reciprocity, it will be met, on the part of the United States, with an earnest wish to substitute a system of the most liberal intercourse, instead of that of counter-prohibitions, which this Act has only rendered complete.”

1822.—Something of an arrangement was put into operation by a British Order-in-Council and a proclamation of the President of the United States. (United States Counter-Case, App., p. 133.)

1823.—The situation was altered by the passage of a United States statute which, among other things, insisted that customs duties upon imports into British colonies from the United States should be no greater than upon similar imports from Great Britain. This statute evoked reprisals upon the part of the British. (Ibid., p. 134.)

1825.—A British statute contained a basis for arrangement, and negotiations were reopened, but without effect (Ibid., p. 135); and

1826.—A British Order-in-Council declared that the United States not having complied with the requirements of the statute of 1825, all trade and intercourse between the United States and the greater part of the British colonial ports should cease. This was confirmed by the statute of 1827. (Ibid., p. 135.)

1827.—The President of the United States issued a similar non-intercourse proclamation—the effect being to revive the prohibitory legislation of 1818 and 1820. (Ibid., p. 136.)

1830.—An understanding was at length arrived at. It was brought into operation by the United States proclamation (5th October, 1830) and the British Order-in-Council (5th November, 1830). Under the terms of these documents a very large measure of freedom of navigation was agreed to. It did not extend, however, to fishing-vessels. The executive action, moreover, was upon both sides voluntary. No treaty was made. (British Case, App., pp. 570, 786.)

